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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-19

PAULEY PETROLEUM INC., COLORADO OIL AND GAS CORPORATION, MESA PETROLEUM CO., MCCULLOCH OIL CORPORATION OF CALIFORNIA, HUSKY OIL COMPANY OF DELAWARE and MACDONALD OIL CORPORATION,

Petitioners,

—against—

THE UNITED STATES OF AMERICA, J. M. HUBER CORPORATION, MIDWEST OIL CORPORATION, ASHLAND OIL & REFINING COMPANY, KEWANEE OIL COMPANY and FOREST OIL COMPANY,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TABLE OF CONTENTS

PAGE

Table of Authorities iii

Note on Citational Conventions ix

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Statutes Involved 4

Statement of the Case 5

A. The Legal Context 7

B. The Lease Sale and Blow Out 13

C. The Government's Arbitrary Response 17

1. The Enforced Suspension of Drilling 18

2. The Imposition of Absolute Liability 22

D. Litigation and the Government's Proferred Explanations 25

1. The Petitioners' Case 25

2. The Secret "Clearance Procedure" 27

3. The Attempt to Scuttle the Liability Regulation 30

E. Post-Trial Developments and the Rulings Below.. 33

1. Further Drilling Suspensions 33

2. The Proceedings in This Case 35

PAGE

REASONS FOR GRANTING THE WRIT 37

I. The Opinion Below Undermines the Publication Requirement of the APA and Does So in a Way That Conflicts With Decisions of This Court and of Courts of Appeals 37

II. The Unresolved Question of the Effect of a Conflict Between Secretarial Regulations and "Adopted" State Law on the OCS Warrants This Court's Attention 46

CONCLUSION 51

EXHIBIT A—

One of Petitioners' Leases With Respect to Their Parcels at Santa Barbara in 1968 ..... E-1

EXHIBIT B—

Explanation of Map Depicting Clearance Status of Leases in Mid-Channel Area Seaward of the City of Santa Barbara (and Map) E-19

SEPARATELY BOUND APPENDICES

PETITIONERS' APPENDIX OF DECISIONS

PETITIONERS' STATUTORY APPENDIX

TABLE OF AUTHORITIES

Cases: PAGE

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 36n

Anderson v. *Butz*, 550 F.2d 459 (9th Cir. 1977) 41n, 44

Appalachian Power Co. v. *Train*, 566 F.2d 451 (4th Cir. 1977) 43, 45

Armstrong v. *Chambers & Kennedy*, 340 F.Supp. 1220 (S.D. Tex. 1972), *modified on other grounds*, 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, 423 U.S. 886 (1975) 32-33, 49

Boston Edison Co. v. *FPC*, 557 F.2d 845 (D.C. Cir.), *cert. denied*, 434 U.S. 956 (1977) 29n

Bourg v. *Texaco Oil Co.*, 578 F.2d 1117 (5th Cir. 1978) 49

Boyd v. *White*, 128 Cal. App.2d 641, 276 P.2d 92 (1st Dist. 1954) 31n

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 29n

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 49

County of Santa Barbara v. *Hickel*, 426 F.2d 164 (9th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971) 21n

County of Santa Barbara v. *Malley*, 396 U.S. 950 (1969) 21n

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) 24n

Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973) 39n

George A. Fuller Co. v. *United States*, 108 Ct. Cl. 70, 94, 69 F. Supp. 409, 415 (1947) 16

Green v. *General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928) 31n

PAGE

Gulf Oil Corp. v. *Morton*, 345 F. Supp. 685 (C.D. Cal. 1972), *remanded for entry of judgment for plaintiffs*, 493 F.2d 141 (9th Cir. 1974) 20, 21, 33, 33n, 34, 40, 45

Laugharn v. *Bolsa Chica Oil Corp.*, No. 456167, Cal. Super. Ct., Los Angeles County (1941) 31-32n
Lewis v. *Weinberger*, 415 F. Supp. 652 (D.N.M. 1976).... 41n
Luthringer v. *Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948) .. 31n

Morton v. *Ruiz*, 415 U.S. 199 (1974) 36, 38, 42-43

Northern California Power Agency v. *Morton*, 396 F. Supp. 1187 (D.D.C. 1975), *aff'd w/o opinion*, 539 F.2d 243 (D.C. Cir. 1976) 43-44

Olsen v. *Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977) 49

Postal Telegraph-Cable Co. v. *Pacific Gas & Electric Co.*, 202 Cal. 382, 260 P. 1101 (1927) 32n
Public Service Co. v. *FERC*, 584 F.2d 1084 (D.C. Cir. 1978) 29n

Reynolds Metals Co. v. *Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978) 41n
Rodrigue v. *Aetna Casualty Co.*, 395 U.S. 352 (1969) .. 49

St. Elizabeth Hospital v. *United States*, 214 Ct. Cl. 322, 558 F.2d 8 (1977) 41n
Sannon v. *United States*, 460 F. Supp. 458 (S.D.Fla. 1978) 41n
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 29n
Smith v. *Lockheed Propulsion Co.*, 247 Cal. App.2d 774, 56 Cal. Rptr. 128 (4th Dist. 1967) 31n
Sun Oil Co. v. *United States* 215 Ct. Cl. 716, 572 F.2d 786 (1978) 21n, 34-35, 45

PAGE

Union Oil Co. v. *Morton*, 512 F.2d 743 (9th Cir. 1975) 35, 40, 45, 48
United States v. *California*, 332 U.S. 19 (1947) 7
United States v. *California*, 381 U.S. 139 (1965) 13

Wah Chang Corp. v. *United States*, 151 Ct. Cl. 41, 49, 282 F.2d 728, 733-34 (1960) 16
Way of Life Television Network, Inc. v. *FCC*, 593 F.2d 1356 (D.C. Cir. 1979) 44
W. G. Cosby Transfer & Storage Corp. v. *Froehlke*, 480 F.2d 498 (4th Cir. 1973) 44
Williams v. *Pacific Coast Aggregates, Inc.*, 128 Cal. App. 2d 777, 276 P.2d 28 (1st Dist. 1954) 31n

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1976)

5 U.S.C. § 551 (1976) 10n, 16n, 41

5 U.S.C. § 552(a)(1) (1976) 3, 4, 36, 37, 38, 39n, 41, 42, 43-44, 45

5 U.S.C. § 553(b) (1976) 22

5 U.S.C. § 553(c) (1976) 22

5 U.S.C. § 555(e) (1976) 4, 16n, 26n, 29n

5 U.S.C. § 558(c) (1976) 4, 16n, 26n

Atomic Energy Act, 42 U.S.C. § 2210 (1976) 24n

Judicial Code

28 U.S.C. § 1255(1) (1976) 3

28 U.S.C. § 1491, (1976), *as amended*, Act of Nov. 1, 1978, Pub. L. No. 95-563, § 14(i), 92 Stat. 2391 5

PAGE

Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, *codified at* 43 U.S.C. §§ 1331-43 (1976) 2, 7

§ 4(a)(2), 43 U.S.C. § 1333(a)(2) (1976) 3, 4, 6, 7, 8, 47, 48-49

§ 4(b), 43 U.S.C. § 1333(b) (1976) 23

§ 4(c), 43 U.S.C. § 1333(c) (1976) 50

§ 5(a)(1), 43 U.S.C. § 1334a(1) (1976) 3, 4, 7, 8, 33, 37, 48

§ 8, 43 U.S.C. § 1337 (1976) 7, 9, 11

Submerged Lands Act of 1953, 67 Stat. 29, *codified at* 43 U.S.C. §§ 1301-15 (1976) 7, 13

Act of Nov. 21, 1974, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561 ..... 39n

Cal. Pub. Res. § 6871.2 (West 1977) 13

Regulations:

43 C.F.R. § 3305a.4 (1978) 10

30 C.F.R. Part 250 (as in force in February 1968)

§ 250.12 .....10, 18, 18n

§ 250.30 10-11

§ 250.40 10

§ 250.42 11

§ 250.44 11

§ 250.45 11

§ 250.91 .....10, 10n

PAGE

30 C.F.R. Part 250 (as amended in 1969)

§ 250.30 .....32, 32n

§ 250.41 31

§ 250.42 .....22-23, 30, 31, 46

§ 250.43 31

§ 250.45 32

§ 250.46 32

Pacific Regional OCS Orders

Order No. 9 ..... 14n

Order No. 10 ..... 29n

Administrative Notices and Announcements:

Dep't of Interior, Statement of Basis and Purpose for Amendment to 30 C.F.R. § 250.42, 34 Fed. Reg. 2503 (1969) 22

Dep't of Interior, Notice of Oil & Gas Lease Sale, 32 Fed. Reg. 20884 (1967) 14

Dep't of Interior, Revised Oil & Gas Lease Form for Outer Continental Shelf, 34 Fed. Reg. 17779 (1969) 11

Treatises:

K. Davis, *Administrative Law of the Seventies* (1976) 44

W. Prosser, *Torts* (4th ed. 1971) 32n

Restatement (Second) of Torts § 520 (1976) 31-32n

PAGE

Other Authorities:

Attorney General's Memorandum on Public Information Section of Administrative Procedure Act (1967) 38-39n

Executive Proclamation No. 2667, 3 C.F.R. 67 (1943-48 Comp.) 7

L. Johnson, *Public Papers of the President 1966* (1967) 38-39

R. Nixon, *Public Papers of the President 1973* (1975) .. 34

S. Rep. No. 572, 79th Cong., 1st Sess. (1945), *reprinted in* S. Doc. No. 248, 79th Cong., 2d Sess. 206 (1946) .. 16n

U.S. Dep't of Interior, *News Release* (June 8, 1979) 47n

U.S. Dep't of Interior, *Outer Continental Shelf Statistics* (1978) 11n, 47n

Note on Citational Conventions

The following citational conventions are used in the Petition:

"A-——" refers to pages in the separately bound Appendix of Decisions below.

"Stat. App. ——" refers to pages in the separately bound Statutory Appendix.

"Px ——" and "Dx ——" refer to plaintiffs' and defendant's trial exhibits, respectively.

"[Name] Tr. ——" refers to pages of trial transcript and to the witness testifying.

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PAULEY PETROLEUM INC., COLORADO OIL AND GAS CORPORATION, MESA PETROLEUM CO., MCCULLOCH OIL CORPORATION OF CALIFORNIA, HUSKY OIL COMPANY OF DELAWARE and MACDONALD OIL CORPORATION,

Petitioners,

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Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners Pauley Petroleum Inc. ("Pauley"), Derby Refining Company(formerly "Colorado Oil and Gas Corporation"), Mesa Petroleum Co., McCulloch Oil Corporation (formerly "McCulloch Oil Corporation of California"), Husky Oil Company (formerly "Husky Oil Company of Delaware"), and Adobe Oil & Gas Corporation (successor by merger to Macdonald Oil Corporation) pray that a writ of certiorari issue to review a judgment of the United States Court of Claims dismissing, after trial, the claims

of petitioners and of the other non-governmental parties to this action.

All of the non-governmental parties are co-lessees of either or both of two oil and gas leases issued by the Department of the Interior pursuant to the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462 (1953), *as amended*, 43 U.S.C. §§ 1331-43 (1976), with respect to parcels under the waters of the Santa Barbara Channel off the coast of California, and all of them were arrayed against the United States in the court below.

The judgment of the Court of Claims was entered on January 24, 1979. That court denied a timely motion for rehearing by Order dated, and filed on, April 6, 1979.

Opinions Below

The Opinion of the Court of Claims providing for the judgment of dismissal of which review is sought is reported *sub nom. Pauley Petroleum Inc.* v. *United States* at 219 Ct. Cl. ——, 591 F.2d 1308 (1979), and is reproduced as Item A (at pp. A-1-35) of the separately bound Appendix of Opinions Below ("App.") being filed with this petition.*

The court filed contemporaneously with its Opinion an Order modifying a very few of its Trial Judge's findings of fact; that Order appears at App. Item B (at pp. A-37-40). Thereafter, the court denied petitioners' motion for rehearing by a further Order dated April 6, 1979 which appears at App. Item C (at p. A-41).

The Court of Claims entered its Opinion on review of a Report of Trial Judge Roald A. Hogenson. The latter

* Pages of the Appendix of Opinions Below are identified herein as "A—".

was filed on March 19, 1976, some five years after the close of trial, and was limited, by a *sua sponte* Order of the court dated November 10, 1975, only to findings of fact. The Report is reproduced at App. Item D (at pp. A-43-334), and the Order curtailing the Trial Judge's reference at App. Item E (at p. A-335).

Jurisdiction

The judgment of the Court of Claims was entered on January 24, 1979, and a duly and timely filed motion for rehearing was denied on April 6, 1979. This Court has jurisdiction to review the judgment of the Court of Claims pursuant to 28 U.S.C. § 1255(1) (1976).

Questions Presented

1. Whether the Department of the Interior, having declined, for an indefinite and unreasonable period and for undisclosed reasons, to act upon petitioners' request for the permit required to drill under their OCS oil and gas leases, can, consistently with the publication requirements of 5 U.S.C. § 552(a)(1) (1976), defeat a suit for breach of contract by alleging, at trial, almost two years after the fact, petitioners' non-compliance with an unpublished, undisclosed, unwritten, and standardless licensing program known as the "clearance procedure"?

2. Whether, under Section 4(a)(2) of the Outer Continental Shelf Lands Act, a regulation promulgated by the Secretary of the Interior pursuant to the rule-making authority conferred by Section 5(a)(1) of that Act, which regulation purports to make the Government's OCS oil and gas lessees absolutely liable for the reparation of all damages, to whomsoever accruing, resulting from oil spills, *or* the law of California, which OCSL Act § 4(a)(2) adopts as federal law for some purposes on the OCS, governs

a lessee's responsibility in tort for harms comprehended by the regulation?

Statutes Involved

This petition involves the publication section of the Freedom of Information amendments to the Administrative Procedure Act ("APA"), 5 U.S.C. § 552(a)(1) (1976); other provisions of the APA governing federal agencies' treatment of applications for licenses required by law, 5 U.S.C. §§ 555(e), 558(c) (1976); provisions of the Outer Continental Shelf Lands Act ("OCSL Act"), 67 Stat. 462 (1953), *as amended,* most notably Sections 4(a)(2), 43 U.S.C. § 1333(a)(2) (1976), and 5(a)(1), 43 U.S.C. § 1334 (a)(1) (1976); and regulations and orders issued by the Department of the Interior pursuant to the OCSL Act. The relevant statutory and regulatory provisions are reproduced in a separately bound statutory appendix ("Stat. App.") being submitted with this petition.

Of particular salience here is the publication section of the APA, 5 U.S.C. § 552(a)(1) (1976), first enacted in 1966, which provides, in pertinent part, that agencies "shall separately state and currently publish in the Federal Register" their "rules of procedure", "substantive rules of general applicability", "statements of . . . the nature and requirements of all formal and informal procedures available", and other matters, and that:

> "Except to the extent that a person has actual and timely notice of the terms thereof, *a person may not in any manner be required to resort to, or be adversely affected by, a matter* required to be published in the *Federal Register* and *not so published.*" *

* Emphasis supplied here and elsewhere throughout unless otherwise indicated.

Statement of the Case

This is an action, filed in the Court of Claims under 28 U.S.C. § 1491 (1976), for, *inter alia,* the breach or "frustration", in 1969 and thereafter, of contracts with the federal Government, *viz.,* two oil and gas leases issued by the Department of the Interior to petitioners and their colessees pursuant to the OCSL Act and covering contiguous parcels on the seabed of the Outer Continental Shelf ("OCS") of the Santa Barbara Channel. The Government had granted these leases in early 1968, for five-year primary terms, in consideration of advance payments totalling $73,854,594 and the promise of future annual rentals and of royalties from the production of hydrocarbons on the leased parcels. (A-70)

Despite the case's commercial, and thus seemingly routine, character, it raises, for this Court's consideration, important issues concerning the application of the Administrative Procedure Act. They concern the Government's claimed power, recognized by the court below, to indefinitely deny, and thus destroy, by means of an unpublished, undisclosed, and standardless licensing authority, the right to drill which it had conferred by contracts of limited term. The annulled right to drill gave those contracts their sole value. On a broader level the case poses a fundamental question of a free polity—whether the mandate of open government ordained by the APA must prevail even when the Government's political executives undertake to regulate substantial interests of property, the use of which has attracted large, and hostile, public attention.

The present action also frames for decision by this Court significant issues about the power of the Secretary of the Interior to create, by regulation, law applicable to the Government's lessees' activities on the Outer Continental

Shelf, thereby displacing the law of the on-shore States which OCSL Act § 4(a)(2), 67 Stat. 462 (1953), *as amended,* 43 U.S.C. § 1333(a)(2) (1976), otherwise adopts as federal law on the OCS. The issues arise in the context of the Government's effort to repudiate, in the privacy of the courtroom, regulations published by the Secretary in the *Federal Register* in February 1969 and relied upon by petitioners, which established a regime of "absolute" and unlimited lessee liability, regardless of fault or cause, for any spill from oil wells on the OCS. This promulgation had a crippling and, we submit, legally frustrating effect on petitioners' capacity to carry out their lease contracts.

The case posing these questions is part of the legal aftermath of a celebrated oil well "blow out" on the OCS of the Santa Barbara Channel on January 28, 1969. (A-285) This unfortunate mishap did not involve petitioners or their co-lessees in any way. But it did spill some 10,000 barrels of oil into the sea (A-285-86), provoke a popular uproar (A-287), and create, on the morrow of its arrival in Washington, a continuing public relations "hot potato" for the then-new Nixon Administration.

In the wake of this episode, the Interior Department's executives took steps, without any attempt at compensation, which effectively revoked petitioners' contractual and dearly bought right to drill at Santa Barbara and which brought the petitioners, first to the Court of Claims and now to this Court. The Government seeks to justify this course by reference to petitioners' alleged failure to comply with, and to pass, secret and undocumented "regulatory" requirements, the existence of which was disclosed for the first time, not in the *Federal Register* when they ostensibly took effect, but by the testimony of defense witnesses at the trial of this case, some two years after the events in question.

A. The Legal Context

Congress enacted in 1953 the OCSL Act and a companion measure, the Submerged Lands Act of 1953, 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-15 (1976), to resolve the so-called "tidelands oil" controversy precipitated by this Court's decision in *United States* v. *California*, 332 U.S. 19 (1947) (holding the federal Government had paramount rights in the seabed beyond the tidal low-water line). Broadly speaking, the Submerged Lands Act conveyed to the seaboard States the submerged lands out to the three-mile limit; the OCSL confirmed a prior Presidential assertion of national jurisdiction and control over the seabed and subsoil of the continental shelf beyond that line, *see* Executive Proclamation No. 2667, 3 C.F.R. 67, 68 (1943-48 Comp.), and established a regime for the orderly development of the zone's petroleum and other mineral resources under the aegis of the Secretary of the Interior.

Of particular significance to the present case are OCSL Act §§ 8(a), (b), 5(a)(1), and 4(a)(2). Sections 8(a), (b), 43 U.S.C. §§ 1337(a), (b) (1976), provide for the Government's grant of oil and gas leases on the OCS as follows:

> "(a) In order to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf, the Secretary is authorized to grant to the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance, oil and gas leases on submerged lands of the outer Continental Shelf . . . . The bidding shall be (1) by sealed bids, and (2) at the discretion of the Secretary, on the basis of a cash bonus with a royalty fixed by the Secretary of not less than 12½ per centum in amount or value of the production saved, removed or sold . . . .

"(b) An oil and gas lease issued by the Secretary pursuant to this section shall (1) cover a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, (2) *be for a period of five years* and as long thereafter as oil or gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon . . . [and] contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease."

Section 5(a)(1), 43 U.S.C. § 1334(a)(1) (1976), granted rule-making authority to the Secretary of the Interior in these expansive terms:

"The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and *conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein*, and, notwithstanding any other provision herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter."

Section 4(a)(2), 43 U.S.C. § 1333(a)(2) (1976), provided as follows for the qualified adoption of State law as federal law on the OCS:

"*To the extent that they are* applicable and *not inconsistent with* this subchapter or with other Federal laws and *regulations of the Secretary now in effect or hereafter adopted*, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted,

amended, or repealed[*] are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . . State taxation laws shall not apply to the outer Continental Shelf."

The Secretary implemented his rule-making authority in 1954 by promulgating, after extensive consultation with the oil industry and other affected interests (Armstrong Tr. 60-61),** regulations, to be administered by the United States Geological Survey, governing the operations of lessees on the OCS; regulations, to be administered by the Department's Bureau of Land Management, providing for the conduct of leasing on the OCS; and a standard lease form to be used to evidence oil and gas leases issued by the Department pursuant to OCSL Act § 8.

The operating regulations are codified in Part 250 of Title 30 of the *Code of Federal Regulations*. Although the Department periodically reviewed them (Moore Tr. 4748-49; *see* Pecora Tr. 4214, 4254),*** it found no occasion to change them, in any material way, between their initial

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* This section was amended in 1975, Pub.L. No. 93-627, § 19(f), 88 Stat. 2146, to substitute the "now in effect" clause for words "as of the effective date of this Act", *i.e.*, August 7, 1953. In 1969, the time of primary significance to this case, the statute adopted the law of on-shore States as frozen in 1953.

** Judge Reuel Armstrong, of Wyoming, was Associate Solicitor, and later Solicitor, of the Department of the Interior during the early years of the Eisenhower Administration and was the principal actor for the Government in the drafting and adopting of the regulations and OCS lease form.

*** The late Dr. William Pecora was Director of the Geological Survey when he testified. Cordell Moore was the former Assistant Secretary of the Interior for Mineral Resources.

promulgation and the time in 1969 when this action arose. Throughout this 15-year period, including early 1968 when petitioners and their co-lessees acquired their Santa Barbara Channel leases in suit for advance bonus payments of $73,854,594, the regulations included a provision, 30 C.F.R. § 250.91 (Stat. App. 44-47); it conditioned the drilling of each well by a lessee upon the receipt of a permit to be issued by the Geological Survey's Regional Supervisor for Oil and Gas or, at the latter's discretion, his delegate, the District Engineer.*

The Regional Supervisor also was authorized, by 30 C.F.R. § 250.12(b) (Stat. App. 36-37), to impose "emergency suspensions" as follows:

> "The supervisor is authorized to require a lessee by written notice to suspend any operation or method of operation which endangers life or threatens immediate, serious, or irreparable damage to the leased deposits or other valuable mineral deposits."

Such a suspension carried with it a corresponding extension of the lease's primary term. 43 C.F.R. § 3305a.4.

The regulations also undertook to provide for the safety of the lessees' operations on the OCS. 30 C.F.R. § 250.30 (Stat. App. 38-39) specified, in pertinent part:

* The permits required by Section 250.91 are, of course, "licenses" within the meaning of the APA and proceedings to obtain them are "agency proceedings." *See* 5 U.S.C. § 551(8), (9), (12) (1976).

The Regional Supervisor relevant to this case was the Pacific Regional Supervisor for Oil and Gas with offices in Los Angeles. (A-287-88) Under the organizational charts of the Geological Survey prevailing throughout the period significant to this action, he was three rungs below the Director, serving under the Chief of the Survey's Conservation Division and the Chief of the Division's Oil and Gas Branch. (A-287-88)

> "The lessee shall take all reasonable precautions to prevent damage or waste of any natural resource or injury to life or property or the aquatic life of the seas."

30 C.F.R. § 250.40(b) (Stat. App. 42-43) indicated that:

> "The lessee shall take all reasonable precautions to prevent any well from blowing open and shall take immediate steps and exercise due diligence to bring under control any such well. Storm chokes or similar safety devices shall be installed in any well capable of flowing oil or gas. . . ."

Other provisions required the lessee to "carry on all operations . . . in a safe and workmanlike manner", 30 C.F.R. § 250.45; to take "all reasonable precautions" against accidents and fires and to control wells, 30 C.F.R. §§ 250.40 (a), 250.44, and not to discharge wastes into the sea or underground formations, 30 C.F.R. § 250.42. (*See* Stat. App. 42-44)

The Interior Department's 1954 promulgations also included a standard oil and gas lease form which, thereafter, was used, without material change* (admitted Answer ¶ 17), to evidence every oil and gas lease—some 1,380**—issued by the Government under OCSL Act § 8 between the form's adoption and its replacement, subsequent to the Santa Barbara spill, by a significantly revised form prescribed by the Department in October 1969, 34 Fed. Reg. 17,779 (1969). A copy of one of the two leases signed by

* The form was modified, from time to time after 1954, to incorporate equal employment opportunity clauses required by later-enacted statutes and Executive Orders designed to protect the civil rights of all Americans.

** *See* U.S. Dep't of the Interior, *Outer Continental Shelf Statistics* 13-14 (1978).

petitioners with respect to their parcels at Santa Barbara in 1968 is included, by way of illustration, as Exhibit A to this petition. Relevant quotations from this document also appear in the Trial Judge's Report at A-294-98.

Such standard lease forms granted to the lessee(s) the "exclusive right and privilege to drill for . . . and dispose of all oil and gas deposits" for a primary term of "five years and as long thereafter as oil or gas may be produced from the leased area in paying quantities. . . ." (*See* Lease § 1) The leases also included a "diligence" provision (§ 2(i)) obligating the lessee:

> "To exercise reasonable diligence in drilling and producing the wells herein provided for; to carry on all operations in accordance with approved methods and practices including those provided in the operating and conservation regulations for the Outer Continental Shelf; . . . . *Provided,* That the Lessee shall not be held responsible for delays or casualties occasioned by causes beyond the Lessee's control."

We invite attention to the "wasting" character of the Government's oil and gas leases. Those agreements contemplate a limited primary term in which the lessee can probe the parcel with exploratory wells drilled, as a rule, from floating barges. If production is established, a further period, which may well last more than 20 years (*cf.* A-295-96), is provided to deplete the reservoirs. In the marine setting of the OCS, such production conventionally is conducted from specially constructed and extraordinarily expensive (about $10,000,000 each at 1969 prices (Px 825)) "platforms" erected on the seabed. Such platforms serve as the drilling sites for many wells and, in petroleum industry practice, are sited on a parcel after the economically optimal locations have been identified by the earlier exploratory drilling from barges.

B. The Lease Sale and Blow Out

In the years following the "tidelands" legislation of 1953, the State of California leased for oil and gas development (to petitioner Pauley, among others) many Santa Barbara Channel parcels in the strip, within three miles of the shore, which clearly had been conveyed to the State by the Submerged Lands Act.* (A-56) But California, by statute, *see* Ca. Pub. Res. § 6871.2 (West 1977), excluded from lease a so-called "sanctuary" occupying the three-mile wide strip for a distance of sixteen miles in the mid-Channel area immediately seaward of the City of Santa Barbara and its environs.

The State also laid claim to the rest of the Channel seabed, contending that all of the Channel, which is bounded by a chain of off-shore islands (A-54), constituted "inland waters" covered by the federal conveyance contained in the Submerged Lands Act. This Court decided that claim against California in 1965. *See United States* v. *California,* 381 U.S. 139 (1965).

Promptly thereafter the Department of Interior set about developing a program to lease parcels on the Channel OCS for oil and gas development. Former Assistant Secretary of the Interior Cordell Moore, the Department's principal actor in these matters, testified below to many meetings with representatives of local government and other interests at Santa Barbara in which some quarters urged that the federal Government act to extend the "sanctuary" all the way across the Channel to the seaward islands. (A-65; Moore Tr. 4723-33) In late 1966, the Department offered for bid at a so-called "drainage sale", and leased to Phillips Petroleum and others, a single parcel including

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* Annexed hereto as Exhibit B is a map, derived from Government charts and publications in the trial record, which depicts, among other things, the principal geographic features and lease locations noted in the course of this discussion.

an oil field which overlapped the State-federal boundary and which already was being produced by lessees on the State side. Phillips rapidly installed a platform to begin production from the federal side of the field. (A-56)

Late in 1967 the Department announced in the *Federal Register* a "general sale" of Channel leases, to be held in Los Angeles on February 6, 1968, at which 110 parcels would be offered for bid, 32 Fed. Reg. 20884 (1967). The Department, in framing its plans for this sale, had accommodated, in part, the local objections by excluding from the areas offered for lease a so-called "buffer zone" extending for some two miles into the mid-Channel seaward of the State "sanctuary".* (A-38, A-66)

At the "general sale" the Government received and accepted high bids, and issued leases for, 71 parcels, collecting advance bonus payments aggregating $602,716,621.** (A-69) Petitioners and their co-lessees were the successful bidders for two contiguous tracts of nine square miles each,

* The local objections had focused on what was thought to be aesthetic undesirability of off-shore platforms and other industrial development which accompanies oil production. (A-65) The Department attempted to meet this view, not only by creating the "buffer zone", but by causing the Pacific Regional Supervisor to issue an OCS Order No. 9 which required subsequent Channel lessees to plan for relatively few, but large and camouflaged, platforms. (A67-68) *See also* A-291.

** The Trial Judge's Report notes:

> "Following the sale, Secretary Udall issued a press release, extolling the investment by the petroleum industry of its money and talent in the development of the domestic resource base in a period of concern over the balance of payments posture of the United States, stating that undoubtedly much of the competition in the sale stemmed from a realization that new domestic supplies were needed for a burgeoning domestic energy market, particularly significant in the crude deficit region of the Pacific Coast, and commenting that the Santa Barbara Channel area had been under intensive geologic investigation for several years . . . ." (A-69)

for which they made bonus payments of $43,503,147 and $30,351,447, respectively. (A-70) The leases, known as OCS-P-0218 and OCS-P-0226, issued to take effect on March 1, 1968.* (A-46)

Petitioners' parcels, and about two-dozen others leased at the general sale, are located contiguously in the mid-Channel area seaward of the "buffer zone" and State "sanctuary" (Exhibit B, *infra*); another large cluster of leased tracts is strung out along the State-federal boundary line in the western end of the Channel; others are located at the Channel's easterly end and at other scattered sites (A-54-55; Px 546 (map)).

Petitioners and their co-lessees set about exploring their parcels. By early January 1969, they had drilled seven wells in the southerly of their two parcels and one on the northerly tract.** The Trial Judge later commented with respect to this drilling that the single well on the northerly parcel represented "very limited drilling of a large area" and that, despite the greater effort on the southerly parcel, "substantial areas of the structure remain to be probed." Nevertheless, the "presence of hydrocarbons was logged in various formations of seven of [the eight wells], indicating the possibility of reservoirs in the tracts." (A-92-93)

Administratively this drilling was uneventful. The Geological Survey's regional officials had acted promptly, usually in a day or so, on each of the permit applications filed with respect to petitioners' exploratory wells and had

* The private parties' ratable interests in the leases in suit vary in size and from one lease to the other. The details as to their shares may be found at A-47-50. The private parties to this action collectively hold 100% of the interests in each of the two leases.

** This exploratory effort entailed expenditures of $3,925,296. This was in addition to $1,490,474 expended by Pauley and other group members on seismic surveys, geological studies, and the like in the period before the general sale took place. (A-91-92)

immediately taken up with petitioners, and cleared up, the infrequent questions they had about such applications. (A-116-17) This practice reflects, it seems to us, the Government's contractual obligation of good faith, *e.g., George A. Fuller Co.* v. *United States,* 108 Ct.Cl. 70, 94, 69 F. Supp. 409, 415 (1947); *Wah Chang Corp.* v. *United States,* 151 Ct.Cl. 41, 49, 282 F.2d 728, 733-34 (1960), and, even more importantly here, the express requirements of the Administrative Procedure Act.*

On January 23, 1969, representatives of petitioners' lessee group held an "operating committee" meeting in Los Angeles to reach agreement on the location for a second exploratory well on their northerly parcel, meant to test an anticlinal structure (*i.e.*, a subsurface geological feature appropriate as a site for an oil field) underlying both of petitioners' parcels. (A-119) Pauley, the group's executive

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* The permit which the Department required as a condition of drilling is a "license", and a proceeding to obtain it is an "agency proceeding" within the meaning of the APA. *See* 5 U.S.C. §§ 551(8), (9), (12) (1976). 5 U.S.C. 555(e) (1976) provides that:

> "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

5 U.S.C. § 558(c) also states:

> "When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings . . . required by law and shall make its decision."

With respect to Section 555(e), the legislative history states:

> "This subsection affords the parties in any agency proceeding, whether or not formal or upon hearing, the right to prompt action upon their requests, immediate notice of such action, and a statement of the actual grounds therefor." S.Rep. No. 572, 79th Cong., 1st Sess. (1945), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 187, 206 (1946).

agent ("operator") for the exploratory program, immediately set about to lease a drilling barge, procure helicopter service, buy necessary items of drilling equipment, and develop detailed plans for a well with a projected cost, over several months of drilling, of $1,463,000. (A-119-20; Px 513)

Shortly thereafter an event occurred which, in the words of the court below, "gave rise to a 'whole new ball game' ". (A-25 n.24) Union Oil and others had made, at the "general sale" of early 1968, the highest winning bid of all (over $60,000,000 (Dx 121)) for the lease (OCS-P-0241) on a parcel immediately adjacent to the "buffer zone". (Exhibit B, *infra*) After quickly delineating a so-called "Dos Cuadros Field", which underlay that parcel and a tract immediately to the east which the Government leased at the sale to Sun Oil and others, Union installed two production platforms on its parcel. On January 28, 1969 a development well being drilled from one of these platforms blew out. Before the spill was contained about ten days later, 10,000 barrels of oil escaped into the sea. (A-285-86)

C. The Government's Arbitrary Response

When the Union well blew out five other wells were then being drilled on the Channel OCS. Interior Secretary Walter J. Hickel flew to Santa Barbara on February 2, held a press conference, and obtained the consent of those drilling to a voluntary suspension of their operations while a team of departmental experts reviewed those operations for safety . (A-289-90) The team did so, concluding that an episode, like that at the Union platform, was unlikely to recur and that such further precautionary measures as seemed indicated could be and would be easily made. The Department lifted its voluntary suspension, and the Secretary announced this action and the conclusions of his expert team in press releases issued on February 4 and 6, 1969. (A-290)

Local government officials reacted, denouncing the resumption and Secretary Hickel at a well-publicized Senate subcommittee hearing in Washington on February 5.* (A-290)

1. ***The Enforced Suspension of Drilling***

On Friday, February 7 the Secretary sent telegrams to the companies which had been voluntarily suspended, invoking 30 C.F.R. § 250.12 and commanding them to, again, shut down their operations.** (A-291-92) He announced this action in a contemporaneous press release. When this case was tried in the winter of 1970-71, it also was disclosed that the Secretary, without any public notice, or any private notice to petitioners, had orally revoked, on February 7, the published authority of the Pacific Regional Supervisor in Los Angeles and his aides to function on drilling permit applications. (A-293)

On February 10 Pauley dispatched to the Regional Supervisor, in the usual way and form, its application for the permit needed to drill its second well on its northerly parcel; it is undisputed that the application fully complied with all requirements then existing. (A-286) In the light of the Secretary's announced actions on the 7th, Pauley also wired him in Washington, pointing out that it had

* The subcommittee chairman, Senator Edmund Muskie of Maine, then being mentioned as a potential candidate for President in 1972, announced his intention to fly to Santa Barbara and to summon the Secretary to testify at a later date. (A-290) The State of California also responded by filing, with the Department of Interior, a $500,000,000 tort claim which, in due course, eventuated in a suit under the Federal Tort Claims Act. (Px 689)

** Only the day before the Secretary had publicly announced the findings of his technical team that the factual predicate for the invocation of 30 C.F.R. § 250.12 (Stat. App. 36-37) did not exist. What additional facts, if any, came to the Secretary's attention on this subject between the 6th and 7th is not disclosed in this record or in any published source of which we are aware.

a drilling barge standing by and requesting advice as to "our position with regard to your regulation with respect to drilling commencement." (A-5 n. 4; Px 539)

The telegram, though received by the Secretary and referred by him to the Director of the Geological Survey, was never answered. (A-5 n. 4) There also was no response of any kind to the permit application filed in Los Angeles. (A-121, A-288) At trial the Government's witnesses testified that the application had been duly received on February 11, had passed across the desks of the Acting Regional Supervisor and several of his aides, (A-288), and had then been forwarded to the Santa Barbara District Engineer who, in his words, deposited it in a file "with all the notices received" and "held [it] in abeyance." * (Px 537; Cypher Tr. 912)

Meanwhile, the Secretary was making public statements which the Trial Judge summarized as follows:

> "In his testimony as a witness in this case in December 1970, shortly after he had resigned [sic] as Secretary of the Interior, Mr. Hickel testified that he sent the telegrams shutting down operations to enable him to have time to evaluate the situation in the channel and

* In a memorandum to the Regional Supervisor, prepared in the immediate wake of a visit of Government trial counsel to California for discovery sessions at Pauley's offices in August 1969, the District Engineer wrote:

> "The office was opened in Santa Barbara on February 17, 1969 and Application to drill was stamped as received in the Santa Barbara office on February 19, 1969. All the notices received were placed in a folder and held in abeyance.
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> • • •
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> "The notice of intention to drill Well OCS-P-0226 No. 2 was reported on the morning of August 15, 1969, when Mr. Maurice Adams called on the telephone and inquired if it was in our files. It was in the file with the rest of the notices that are being held in abeyance. There was not any difficulty in locating it." (Px 537)

to permit a review of the OCS regulations and orders, and that he considered the shutdown to be temporary. That that was his intention is accepted as credible. However, the 'temporary' shutdown became extended with concurrently mounting political pressures, and Secretary Hickel announced on March 21, 1969, that drilling and production would remain shut down in the Santa Barbara Channel indefinitely until he was satisfied that development of natural resources could be managed without endangering natural resources, and on April 1, that he was maintaining a shutdown on OCS lands in the channel, and as late in his tenure as September 15, 1970, that channel lessees had not drilled because they had not been granted permits." * (A-292-93)

No exploratory drilling, by anyone, took place on any of the mid-Channel leases seaward of the City of Santa Barbara from February 7, 1969 through the end of the trial in this case in April 1971—or, indeed, until at least the winter of 1974-75, *see Gulf Oil Corp.* v. *Morton,* 493 F.2d 141 (9th Cir. 1974)—when the written primary terms of petitioners' leases had expired. The Trial Judge found, on the basis of reluctant concessions in the testimony of Government witnesses, that the Department had held in abey-

* The announcement of March 21, 1969, to which the Court's Opinion also alludes at A-7, refers to a statement made by the Secretary at a press conference which he held that date in the hearing rooms of the Committee on the Interior and Insular Affairs of the House of Representatives (Px 873). The reference of April 1, 1969 is to a press release from the "Office of the Secretary" which began:

> "Interior Secretary Walter J. Hickel today said that he is maintaining a shutdown order on 67 leases on federal lands in the Santa Barbara Channel off the coast of California"; (Px 609)

and that of September 15, 1970 to testimony at a public hearing of a House subcommittee (Px 959 at p. 108).

ance, not only petitioners' permit application, but at least two others, filed by Mobil and Texaco, with respect to parcels which adjoined or abutted the northerly of petitioners' tracts. (A-150-51, A-156) *See also Gulf Oil Corp.* v. *Morton,* 345 F.Supp. 685, 687 (C.D. Cal. 1972), *remanded, on rehearing, for entry of judgment for plaintiffs,* 493 F.2d 141 (9th Cir. 1974), which indicates that perhaps a dozen other applications were receiving the same "stonewall", being neither granted nor denied for stated reasons, during the period when this case was on trial.*

The Government's proffered justification for this performance—one which flouts the APA's publication section as interpreted by this Court and several courts of appeal, but which the Court of Claims has sustained—is described at pp. 27-30, *infra.*

* We did not contend below, as the Court of Claims, but not its Trial Judge, mistakenly suggests that no drilling was ever allowed anywhere in the Channel for many years after February 7, 1969. (A-26) At various times during 1969, as we acknowledged and indeed showed, the Government did allow Union and Phillips to resume *production* operations from their existing platforms and Sun Oil Company to install a platform to drain its portion of the Dos Cuadros Field on which the blowout had occurred. A presidential study panel, the DuBridge Committee, had publicly recommended this on the ground that such drilling reduced the likelihood of a further mishap on Dos Cuadros. (Px 987; 1023 at p.9; *see Sun Oil Co.* v. *United States,* 215 Ct.Cl. 716, 572 F.2d 786, 797-98 (1978))

Although the Government offered no proof on the matter, it apparently also permitted, after February 1969, some limited exploratory drilling on leases in the remote western and southeastern extremities of the Channel, far from the City of Santa Barbara. (Px 609) When the Secretary so acted, the County and City of Santa Barbara responded with a suit against the Secretary and others for injunctive relief and a declaration of the unconstitutionality of the OCSL Act. While this action eventually was dismissed on the pleadings, it twice reached this Court on the plaintiffs' unsuccessful petitions for certiorari, *County of Santa Barbara* v. *Malley,* 396 U.S. 950 (1969); *County of Santa Barbara* v. *Hickel,* 426 F.2d 164 (9th Cir. 1970), *cert. denied,* 400 U.S. 999 (1971), and dampened whatever enthusiasm the Secretary may have entertained with respect to further drilling in the Channel.

2. *The Imposition of Absolute Liability*

On February 17, 1969 Secretary Hickel made a second response to the Santa Barbara spill. Invoking the emergency publication provisions of the APA, 5 U.S.C. § 553(b) (1976), the Secretary adopted, without prior notice or opportunity for comment, announced with a press fanfare (A-306-07), and caused to be published in the *Federal Register* (of February 21, 1969, 34 Fed. Reg. 2503 (1969)), an amendment to his Department's OCS operating regulations, designated 30 C.F.R. § 250.42(b) (Stat. App. 51).

The new rule, together with its published statement of basis and purpose, *see* 5 U.S.C. § 553(c) (1976), reads, in pertinent part, as follows:

> "The purpose of this amendment is to set forth in greater detail the *responsibility of lessees for the cost of cleanup and for damages* from oil pollution resulting from operations under the Outer Continental Shelf Lands Act. The amendment is found to be necessary and proper in order to provide for the conservation of the natural resources of the Outer Continental Shelf.
>
> • • •
>
> "Present § 250.42 is designated as 250.42(a) and a new paragraph (b) is added to read as follows:
>
> "§ 250.42 Pollution.
>
> • • •
>
> "(b) If the waters of the high seas are polluted by the drilling or production operations of the lessee, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and removal of the pollutant *and the reparation of any damage, to whomsoever occurring,* proximately resulting therefrom *shall be at the expense of the lessee,* and on failure of the lessee to control and remove the pollutant the Supervisor, in cooperation with other appropriate agencies of the Federal, State, and local governments, or in cooperation with the lessee, or both, shall have the right to accomplish the control and removal of the pollutant at the cost of the lessee, but *such action shall not relieve the lessee of responsibility for reparation of damages as provided herein.*" (Quoted at A-306-07)

This regulation imposed upon lessees a standard of absolute and unlimited third-party liability for the escape of oil which went far beyond anything that existed before, whether the prior standard derived, as we contend, from the pre-existing regulations (Stat. App. 33) or, as the Government contended below, from the law of California "adopted" on the OCS by OCSL Act § 4(b), 43 U.S.C. 1333(b) (1976). In the Channel, an area prone to large earthquakes, heavily traversed by shipping, and surrounded by a populous and well-developed littoral (A-58-60), this promulgation placed a harsh, new and unforseeable burden on drilling—a condition which was aggravated by the almost immediate collapse of the market for liability insurance for marine oil spills.* (A-333-34)

Pauley promptly protested, hand delivering a letter to Secretary Hickel's office on February 20. (A-303) Kewanee, another member of petitioner's group, wired a protest of its own. (Px 1000) The latter was ignored, the former answered with a form letter of "thanks" for Pauley's interest. (Px 542) Both protests were unavailing.

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* The record of this case shows, without contradiction, that damage actions seeking, in the aggregate, more than $1,000,000,000 were filed against Union and its co-lessees following their spill. (Waters Tr. 1555; Px 693-95) These actions were undecided when the trial record in this case closed, and while the *ad damna* were no doubt inflated, it is plain that the potential recoveries, in the case of a large spill, are far beyond the reasonable capability of uninsured small companies such as petitioners.

On February 28, 1969 Secretary Hickel and several aides appeared before Senator Muskie's subcommittee. In his prepared statement, the Secretary said:

> "Another action that I have taken requires *absolute and unlimited liability* with respect to all drilling operations on the Outer Continental Shelf. *This requirement is effective now and will continue to be in effect in the future.*" (Px 620 at p. 944)

In later colloquy, the Secretary commented on the extraordinary scope of his promulgation:

> "Secretary Hickel: Mr. Chairman, if I might just comment on our interpretation of existing regulations that we just issued on Outer Continental Shelf and oil spillage, *we don't exclude act of God.* [Px 620 at p. 952]
>
> • • •
>
> "Senator Cranston: This [the new regulation] goes far and away beyond the cost of cleanup, though. *It applies to liability for damage done to property.*
>
> "Secretary Hickel: *That is right.*" (Px 620 at p. 968)*

* At the trial of this case, the Secretary testified further, that the lessee also would be subject to the liabilities of his regulation with respect to oil spills occasioned by the acts of human third parties, offering as an illustrative hypothetical the case of a platform or anchored drilling barge run down by a passing aircraft carrier of the United States Navy. (Hickel Tr. 4399-4400) By including Acts of God and third-parties in its sweep, the Secretary's regulation goes far beyond the concept of "strict liability" which the common law recognizes in a very limited class of cases. The closest model in law of which we are aware is the treatment which the Price-Anderson amendments to the Atomic Energy Act afford the "extraordinary nuclear occurrence". There unlimited licensee responsibility is accompanied by a limitation of total liability and a substantial Government indemnity. *See generally Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), and 71 Stat. 576 (1957), *as amended*, 42 U.S.C. § 2210 (1976).

Other statements to the same effect were made at a press conference (A-292) and other congressional hearings. (Dx 238 at p. 176; Px 619 at pp. 41-42)

D. Litigation and the Government's Proffered Explanations

1. *The Petitioners' Case*

On April 9, 1969 Pauley, Colorado Oil, Mesa, Husky, McCulloch and Huber filed their Petition with the Court of Claims.* (A-44) They alleged that the Government, by denying them, without explantion, the right to drill and by imposing, in the setting of the earthquake-prone, shipping-traversed, deep-water Channel,** the burden of absolute and unlimited liability for possible spills, had either frustrated or breached plaintiffs' lease contracts.***

The plaintiffs asked for restitution of their ratable shares of lessees' bonus payments of $73,854,594 and annual rentals**** or for their ratable shares of contract

* The Opinion below views petitioners' resort to the court as quick (A-19-20), but the disclosed conduct of the Government had, by April 9, created causes of action or, at the very least, the reasonable perception of them. Nothing that the Government did thereafter "cured" the conduct (refusal to act on the drilling request and the imposition of an onerous new liability standard) which, in petitioners' view, entitled them to a remedy.

** The water depth on petitioners' parcels ranges from about 220 to about 750 feet. (A-61) While drilling has since been accomplished in much deeper waters—about 4,000 feet in a very recent experimental probe off West Africa—petitioners were operating, in 1969, at very close to the practical limit of available technology. Much shallower waters generally prevail in those areas of the Gulf of Mexico where most oil and gas activity on America's OCS has thus far taken place. (A-62)

*** Petitioners also alleged alternative pleading theories of "taking" and mutual mistake. (A-20-22, A-30-32) The present petition raises no question about their rejection by the court below.

**** The leases required, prior to the establishment of production for which royalties would be due, payment of an annual rental of $3/acre (or $17,280/per lease) per year. The lessees on

damages for the breached leases, which they estimated, for the totality of the two leases, at $230,000,000.

The Government answered with, in substance, a general denial and an affirmative defense which alleged the absence of indispensable parties, *viz.*, the plaintiffs' five other co-lessees. There was no mention of the "clearance procedure" of which so much was heard at trial. The Trial Judge entered an Order directing the other lessees to appear, and they did so, asserting claims to their ratable shares of the recoveries sought. (A-45-46)

At a pre-trial conference on September 4, 1969 plaintiffs proposed, the Government opposed, and the Trial Judge declined to order a bifurcation of the case so as to provide separate trials of liability and then, if liability be found, of damages.* The case went to trial on October 12, 1970 and continued, through 89 hearing days, until April 15, 1971. The proofs of the trial record, and the Trial Judge's Report, which eventuated five years later on March 19, 1976, are largely devoted to issues of damages not relevant at this stage of the action.

At trial petitioners and their co-plaintiffs showed their preparations in January and early February 1969 to drill a second well on their northerly parcel (A-119-21); their submission of, and the Government's inaction on,** their

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the parcels in suit had paid, at the time of suit, two annual rentals, and they continued to pay, and the Government to accept, annual rentals through the five-year primary terms provided by the leases. (A-9; *see also* A-70-71) The total rental amount involved is, thus, $172,280.

* The Trial Judge also denied, on August 6, 1969, a motion of the American Civil Liberties Union, filed on or about July 11, 1969, for leave to submit an *amicus* brief supporting the proposition that plaintiffs were the victims of a "taking".

** Despite the mandates of 5 U.S.C. §§ 555(e), 558(c) (1976) quoted at p. 16, *supra*) the Government neither granted the

permit application (A-121, A-288); the Secretary's disregard for their telegraphic request for illumination (A-5) and his many contemporaneous public statements about "shutdown orders" and "indefinite" suspensions (A-292-93, A-305); the total cessation of exploratory activity in the mid-Channel area seaward of the City of Santa Barbara (A-150-51, A-156; Exh. B, *infra*); the promulgations of Secretary Hickel's absolute liability regulation on February 17, 1969 (A-306-10); and the consequence of this regulation in terms of earthquake hazards (*see* A-58-59), loss of liability insurance (A-333-34), the scope of the potential damage exposure (Px 693-95), and other relevant matters.

2. *The Secret "Clearance Procedure"*

For its part, the Government, at trial, responded to the challenge to its inaction on plaintiffs' permit request by pointing to a telegram which Secretary Hickel had sent to all Santa Barbara Channel lessees on March 1, 1969 and to a subsequent exchange of correspondence between Pauley, as operator for petitioners' lessee group, and the Regional Supervisor later that month and in early April 1969. The Secretary's telegraph spoke of a "review of the factors affecting the safety of drilling operations" and called for the Department's "access to all available geological, geophysical and structural information." (A-312)

Pauley, after writing to the Regional Supervisor for an explication of this Delphic request, forwarded to him on April 4, 1969 what it thought was desired under cover of a

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application nor denied it for a stated reason (whether legally sound or not). Any stated reason, if not a categorical indefinite ban on drilling in mid-Channel area would have been a *de facto* public announcement by the Department that the Department was prepared in principle to countenance early drilling in the area, of high public salience, where none, in fact, was allowed to occur for well over five years after February 7, 1969. (*See* pp. 20-21, *supra*.)

letter which said "[i]f at any time you need any other information or would like to discuss the Geology of our leases, please give us a call and we will arrange a satisfactory meeting." * (A-326) There was no subsequent response by the Government of any kind. (A-9; A-326-27)

The Government represented through the oral testimony of the Director and several regional officials of the Geological Survey that the telegram of March 1, 1969 and subsequent correspondence were steps in a program they called the "clearance procedure". According to this view the Secretary had established, shortly before March 1, a program whereby leases in the Channel were to be reviewed by a group set up in the Survey's Los Angeles office under the style of "Task Force II" and these studies were to be reviewed by the Geological Survey's Conservation Division in Washington, by the Survey Director, and, finally, by the Secretary. Only if all approved with respect to a lease would the published authority of the regional officials to function on drilling permit applications with that lease be restored. (A-313)

Notwithstanding Pauley's letter of April 4 and its accompanying data, the vast mass of drilling logs, paleontological materials, and other data which Pauley had routinely filed with the Regional Supervisor, pursuant to regulation, after completion of each of the wells it had previously drilled (A-116; *see generally* Px 1-103) and Pauley's ungrudging response in 1969 and early 1970 to the Government's vacuum-cleaner requests for pre-trial discovery of "underground" data relevant to damage issues,** plaintiffs'

* Representations of the lessees' desire to cooperate with whatever the Department had in mind also were included in an earlier letter by Pauley to the Regional Supervisor (A-323-24) and by a telegram by Kewanee to the Secretary on March 31, 1969. (Dx 168)

** The principal member of Task Force II, a Survey geologist by the name of Keith Yenne (A-313-14), also was the Government's principal expert witness at trial as to the "underground" aspects of petitioners' parcels. (A-313) He devoted, it would seem, about six months of 1970 to his litigation preparations. At trial he testified for five days and never referred to any conditions on petitioners' parcels which made them inappropriate sites for drilling.

parcels were never considered for "clearance"; the data on hand, the witnesses said, was insufficient. Thus, authority to act on petitioners' permit application had never been restored to the regional officials* and that application, in the words of the District Engineer's memorandum of August 1969 remained "in the file with the rest of the notices that are being held in abeyance." (Px 537)

The establishment, existence, and terms, whether of practice or substance, of this "procedure" never were published in the *Federal Register* or otherwise publicly disclosed.**

* One of the Government's witnesses from the regional offices also testified, without, however, pointing out why, that the application did not, in his view, comply (A-317; Cypher Tr. 5882; Px 537) with an OCS Order No. 10 (Stat. App. 77) which had been promulgated six weeks after the application had been filed (A-305); *but see Boston Edison Co.* v. *FPC*, 557 F.2d 845 (D.C. Cir.), *cert. denied*, 434 U.S. 956 (1977); *Public Service Co.* v. *FERC*, 584 F.2d 1084 (D.C.Cir. 1978) (refusing to retroactively apply new filing standards to previously filed applications). As the Opinion of the Court of Claims notes, Order No. 10 stated "that no drilling would be allowed until all pipelines used to transport oil to shore facilities were inspected by the Geological Survey," (A-7), but it is undisputed and indisputable that pipelines to shore have no role in exploratory drilling from floating barges (*see* A-117-20). Lines come, if at all, at a later stage when platforms for full-scale production are installed. (Oil may also be removed from a platform, as it is from an exploratory site, by vessel.) In any case, the witness' conclusion, whether or not correct, concededly had never been reached administratively, or communicated to Pauley or any of the co-lessees (A-287; Cypher Tr. 5882; *see* 5 U.S.C. § 555(e) (1976)), by reason of the Secretary's undisclosed suspension of the regional officials' authority on February 7, 1969. Thus, this objection is irrelevant here. *See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

** The Government has never identified, in any brief before the Trial Judge or Court of Claims, a documentary "source" for the "procedure", whether in the trial record or otherwise.

(Pecora Tr. 4979-80) Indeed, according to the witnesses, there was no written description, even in the files of the Department of the Interior, of the mechanisms and the "procedure" and, perhaps even more important, of its substantive standards—the criteria which distinguished a lease that was deemed "clearable" from one that was not. (A-314; Fackler Tr. 5966; Yenne Tr. 7455) Witnesses from the regional offices said they orally briefed some lessees at Santa Barbara about the procedure, but they concededly did not so communicate with the petitioners or their co-lessees. (A-315) The latter were "stonewalled" with silence.

In response to this testimony, plaintiffs served subpoenas which produced, in the later stages of the trial, a list of leases "cleared" and "uncleared". As of mid-January 1971, a date two years after the "blow-out", the Department had not "cleared" for exploratory drilling any of 20 parcels, including petitioners', in the mid-Channel area seaward of the City of Santa Barbara.* (*See* the map and accompanying explanatory text, Exhibit B, *infra*, for the details.)

3. *The Attempt to Scuttle the Liability Regulation*

As to the liability regulation, the Government argued, contrary to the text of the 30 C.F.R. 250.42(b), its statement of basis and purpose, and the Secretary's explicit representations to a Senate subcommittee concerning its scope, that the promulgation of February 17, 1969 was not

* In most of these cases, the regional officials testified they had forwarded recommendations for "clearance" to the Washington echelons of the procedure where the recommendations simply gathered dust for periods of up to a year without any expression of dissatisfaction, or requests for further data, to the field. (Px 999 (list of dates prepared by Survey in response to trial subpoena); Tr. 6356-59)

meant to impose upon lessees liability to third parties with respect to spills; it merely "clarified" an existing lessee obligation to clean up a spill. Liability to others was governed by the law of the on-shore States, and in the case of Santa Barbara, that was the law of California which, the Government said, imposed an absolute liability on Channel lessees.* (A-14 n. 12)

The Government also pointed to a further revision of the OCS operating regulations, promulgated by the Interior Department in August 1969, well after the present suit began. In these amendments 30 C.F.R. § 250.42 was renumbered as 30 C.F.R. § 250.43, and the third-party liability "for pollution" which had been imposed by Section 250.42(b) was referred, by a new 30 C.F.R. § 250.43(c), to "applicable law", as follows:

> "(c) The lessee's liability to third parties, other than for cleaning up the pollutant in accordance with paragraph (b) of this section shall be governed by applicable law." (Stat. App. 66)

* The premise for this theory was California's acceptance of the tort doctrine of the "ultra hazardous" or "abnormally dangerous" activity, *see Restatement (Second) of Torts* § 520 (1976), and its application, in one reported case 50 years ago, to a blow-out of an oil well being drilled into a known high pressure zone in the middle of a built-up urban community, *see Green* v. *General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (1928). The Government's theory that California treats all, rather than, at most, a tiny fraction of abnormal wells, as "ultrahazardous" is unsupported by any case citation, and is contradicted by a host of cases which show that the courts of California, like the courts of most jurisdictions, apply the "ultrahazardous" concept situationally rather than categorically. *See, e.g., Luthringer* v. *Moore*, 31 Cal. 2d 489, 190 P.2d 1, 8 (1948); *Boyd* v. *White*, 128 Cal.App.2d 641, 276 P.2d 92, 100 (1st Dist. 1954); *Smith* v. *Lockheed Propulsion Co.*, 247 Cal.App.2d 774, 56 Cal.Rptr. 128, 138 (4th Dist. 1967); *Williams* v. *Pacific Coast Aggregates, Inc.*, 128 Cal.App.2d 777, 276 P.2d 28, 33 (1st Dist. 1954); *Laugharn* v. *Bolsa Chica Oil Corp.*, No. 456167, Cal.Super.

At the same time, however, the Department also modified portions of the "applicable law"—*i.e.*, the Department's operating regulations—to make absolute the prohibition against well blow-outs, fires, and other mishaps which might give rise to large spills. *See*, as amended in August 1969, 30 C.F.R. §§ 250.30, 250.41, 250.45, 250.46* (texts at Stat. App. 59, 62-65, 66-67). These changes have subsequently been held to make a lessee absolutely liable for non-negligent injuries resulting from a violation of these regulations, notwithstanding the contrary law of the onshore State, *see Armstrong* v. *Chambers & Kennedy*, 340 F.Supp. 1220, 1233-34 (S.D.Tex. 1972), *modified on other grounds*, 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, 423 U.S. 886 (1975).

Ct., Los Angeles County, July 21, 1941 (copy of opinion supplied to Court of Claims) (oil drilling not "ultrahazardous").

Oil well drilling is an activity of high social importance which gives rise to no more than the risk of occasional mishaps which attends any industrial undertaking. Under accepted doctrine, its conduct, under affirmative governmental encouragement, indeed sponsorship, in such an entirely appropriate setting as the OCS, where it is not "out of place", is not "ultrahazardous". *See Postal Telegraph-Cable Co.* v. *Pacific Gas & Elec. Co.*, 202 Cal. 382, 260 P. 1101, 1102-03 (1927); *Restatement (Second) of Torts* § 520 (1976); W. Prosser, *Torts* § 79, at 524-25 (4th ed. 1971).

Significantly, the Government's purported reliance on State law to govern liability arising from spills on the OCS in violation of its regulation has not been disclosed, so far as we know, in any public announcement of the Department of the Interior or other document apart from briefs filed in this case.

* The Secretary issued in August 1969 a contemporaneous press release calling attention to these amendments as one of the "highlights of *changes strengthening* operating regulations (30 C.F.R. Part 250)", commenting as follows:

> "4. Change in provision so that the lessee must take all "necessary precautions" to protect natural resources, life, property and aquatic life rather than merely "all reasonable precautions" as formerly required. (Compare new Section 250.30 with previous Section 250.30)." (Px 1173 at p. 4)

As a trial witness sixteen months later, Mr. Hickel was asked the reason for the switch from "reasonable" to "necessary" in these sections, and he replied, "No, I can't tell you exactly why it was changed from 'reasonable' to 'necessary'. *It might be some legal reason why it was done.*" (Hickel Tr. 4454)

E. Post-Trial Developments and the Rulings Below

1. *Further Drilling Suspensions*

On April 21, 1971, a few days after the end of the trial in this case, the Geological Survey's Pacific Regional Supervisor, acting at the explicit direction of Interior Secretary Rogers C. B. Morton, Mr. Hickel's successor, issued formal orders suspending exploratory operations on 35 Channel parcels through the life of the ninety-second Congress (until January 3, 1973) and correspondingly extending the primary terms of the affected leases. The orders did not extend to petitioners' parcels, but covered, *inter alia*, the others in the mid-Channel, including two immediately to the west of the petitioners' which shared, according to the testimony of the experts for both sides (A-107, A-148-49; Px 546), the same underground anticlinal structures as petitioners'. The orders cited as justification the Secretary's asserted power to suspend in the interest of "the conservation of the natural resources of the outer Continental shelf," OCSL Act § 5(a)(1), 43 U.S.C. § 1334 (a)(1) (1976) (Stat. App. 25), while Congress considered a proposal by Mr. Morton that it cancel the affected leases and provide for appropriate compensation.*

Gulf Oil and others affected by the orders filed suit in the United States District Court for the Central District of California which set them aside as unlawful. *Gulf Oil Corp.* v. *Morton*, 345 F.Supp. 685 (C.D. Cal. 1972). The Gov-

* The implementing bills were not made the subject of hearing and never left committee. The account in the above paragraph of text is, in substance, a *precis* of the findings of the courts in the litigation which ensued. *See Gulf Oil Corp.* v. *Morton*, 345 F.Supp. 685 (C.D.Cal.1972), *remanded, on rehearing, for entry of judgment for plaintiffs*, 493 F.2d 141 (9th Cir. 1974).

ernment obtained a stay and appealed. While the appeal was pending in the Ninth Circuit, the orders of April 1971 expired in accordance with their terms and were replaced by new orders suspending operations on, and extending the term of the leases with respect to, the same 35 parcels for the life of the ninety-third Congress, which also received and took no action on a second cancellation proposal from Mr. Morton. On September 10, 1973 President Nixon addressed to the Congress a "Special Message on National Legislative Goals", which, *inter alia,* renewed the call for legislation to terminate Channel leases. *See* R. Nixon, *Public Papers of the President 1973* pp. 770-71 (1975). On November 13, 1973, in the wake of the "Yom Kippur War" of October 1973 in the Middle East and the resulting Arab oil embargo, the Department withdrew its request for termination legislation in favor of further studies. *Gulf Oil Corp.* v. *Morton,* 493 F.2d 141, 150 (9th Cir. 1974).

The Ninth Circuit ruled for the *Gulf* plaintiffs, but on grounds different from those of the District Court. The Court of Appeals held that the initial formal suspension had been for a purpose authorized by the OCSL Act and thus was initially proper, but that the power to suspend for the purpose of legislative consideration expired when the ninety-second Congress adjourned *sine die* in late 1972. (493 F.2d at 149)

In September 1971, five months after the close of the trial in this case, Secretary Morton also issued orders revoking a permit granted to Union Oil in late 1968, and suspended in February 1969, to install a third platform on another portion of the "blow out" parcel and denying an application, filed by Sun Oil in early 1970, for authority to install a second production platform on its adjacent parcel. The order as to Sun was held a breach of contract, after a trial limited to liability issues, in *Sun Oil Co.* v. *United States,* 215 Ct.Cl. 716, 572 F.2d 786 (1978), and the order as to Union was set aside in *Union Oil Co.* v. *Morton,* 512 F.2d 743 (9th Cir. 1975).

2. *The Proceedings in this Case*

Meanwhile, petitioners' case was *sub judice,* and the written primary terms of their unsuspended leases expired in early 1973 (several months before the "Yom Kippur War" and oil embargo) without any action ever having been taken by the Department, one way or the other, on their application for a permit and "clearance".

Although the parties had exhaustively briefed the case to the Trial Judge on both the facts and the law, the Court of Claims entered, *sua sponte,* on November 10, 1975 an Order limiting his reference to a Report on the facts. (A-335) His Report (A-41-334), so truncated, was filed on March 19, 1976.

Without the benefit of recommendations as to law by the hearing officer familiar with what was, inevitably, a large and nuanced record, the court rejected plaintiffs' claims, holding that

> "we cannot give plaintiffs any relief because they had no legal rights, vindicable here, when they brought suit, and have not acquired any in the course of the litigation." (A-34)

As to the Government's refusal even to act on petitioners' drilling permit application, the Court held that the Government's refusal to do so between the application's filing on February 11 and April 9, 1969, although not contemporaneously explained or accompanied by a suspension of the running of petitioners' lease terms, was reasonable in the circumstances. (A-24-25) The inaction thereafter was justified by petitioners' failure to "pass" the "clearance proce-

dure". (A-25-27) "If plaintiffs", the court said, "had gone through the required procedure for clearance and still not been allowed to drill, we might have a different case." (A-27 n. 26)

The court brushed aside our protest that petitioners could not be expected, or required, in the light of 5 U.S.C. § 552 (a)(1) (1976), to resort to, or be "adversely affected", by this unpublished and undocumented procedure. This secret program, we urged, was a nullity which could not justify the Government's denial of petitioners' contract rights by refusing to act on their application within a "reasonable" time—a time, which if it had not expired on April 9, 1969, surely had done so before the start of trial in late 1970. "It is unclear", the court said without explanation, "whether the clearance procedure should have been published" (A-27-28 n. 27), and, in any case, "the Pauley group was [not] unable to obtain the necessary information if it had really wanted to". (A-27)

Our further contention that an unpublished, unwritten "procedure", without any defined standard for "clearance" beyond the whim of the Secretary, was inherently arbitrary (and had, in fact, been applied arbitrarily in the mid-Channel area) was dismissed as a "failure to present clear and convincing proof of government deceit". (A-26) In defining the issue as one of, in effect, fraud *vel non*, the Court of Claims did not even allude to, let alone attempt to distinguish, this Court's decision in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), or any of the other appellate cases holding ineffective, under 5 U.S.C. § 552(a)(1) (1976), the use of unpublished standards to control the grant of benefits otherwise within an agency's discretion.*

* In one guise or another, the question of standards to guide agency action has been a central issue of administrative law at least since the days of *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

As to petitioners' claim that their leases had been frustrated by Secretary Hickel's promulgation of new liability standards on February 17, 1969, the court simply refused to decide it. Pointing to the parties' disagreements about the applicable liability standards and to a 20-year old law review comment by Judge Skelly Wright which noted the difficulty of choice-of-law questions on the OCS (A-15) and omitting to mention any of the authorities, in this Court and elsewhere, which have dealt with the matter since, the court disposed of the matter by saying "the standard of liability was uncertain and ambiguous" both before and after the Secretary's actions. (A-14) It even erected a "doubt" which the Government never had suggested in ten years of litigation, which the Secretary of the Interior had explicitly disavowed in 1969, and which OCSL Act § 5(a)(1), 43 U.S.C. § 1334(a)(1) (1976) (Stat. App. 24), rebuts, *viz.*, that the regulation of February 17, 1969, whatever its precise effect, would not apply to leases in existence at the time of the regulation's issuance. (A-17)

Reasons for Granting the Writ

I.

The Opinion Below Undermines the Publication Requirement of the APA and Does So in a Way That Conflicts With Decisions of This Court and of Courts of Appeals.

Despite the burden of necessary exposition, the Opinion of the court below and the record plainly pose an important question concerning the application of the publication section of the Freedom of Information amendments to the APA, 5 U.S.C. § 552(a)(1), which warrants this Court's attention. May the Department of the Interior (and, in-

ferentially, the many other federal agencies which contract with citizens) invoke an unpublished, undisclosed, unwritten, and standardless licensing program (here the so-called "clearance procedure") to justify conduct which otherwise would constitute breach of contract?

We submit that the proper answer is "no", and that the Court of Claims, in ruling otherwise and giving effect to Interior Department's clandestine "clearance procedure", has placed itself in conflict with the implications of the Court's holding in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), and, as well, with decisions of several courts of appeals. The Congress and President plainly thought, when they first enacted 5 U.S.C. § 552(a)(1)(1976) and the other Freedom of Information amendments in 1966, that they were providing legislation of fundamental importance to the health of our free society in an era of inevitably "big" government.

President Johnson commented when he signed the 1966 enactment into law:

> "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest." • L. Johnson, *Public Papers of the President 1966* at p. 699 (1967).

The Court should seize the present opportunity to authoritatively construe 5 U.S.C. §552(a)(1)(1976) and to confirm the beneficient effect for our polity that it was intended to have.•

The question in the present case is not, as the Court of Claims seemed to think, whether the Secretary of the Interior has the power, in the abstract, to suspend or defer, for a time, operations on an OCS lease in response to an event which he viewed, or chose to perceive, as an "emergency". (A-25) The Court of Appeals for the Ninth Circuit has recognized that the Secretary does have such a power, if it is properly exercised, and petitioners have not contended otherwise.

• The Attorney General, in a memorandum which commented on the statute for the guidance of the Executive Branch and was published as a booklet for public sale by the Government Printing Office in June, 1967, remarked in a foreword:

> "[T]his statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at p. iii (1967).

With respect to the statutory section involved here, he wrote:

> "The subsection [§ 552(a)(1)(B)] requires agencies to disclose, in general terms designed to be realistically informative to the public, the manner in which matters for which it is responsible are initiated, processed, channeled, and determined." (p. 8)

• The effectiveness of the "disclosure" requirements through which the Congress has sought to condition and to control the vast and potentially arbitrary powers of the federal Executive has been a matter of continuing legislative concern. The present case arose during a period of our national life when, as a painful history now teaches, the concept of open government often was subverted. When the Congress learned, through this Court's authoritative construction of other FOIA sections, that its 1966 efforts had not opened the doors wide enough, it amended the statute. *Compare Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973), *with* Pub.L. No. 93-502, §1(b)(2)(1974). For analogous reasons, the doubt, generated by divided views in lower courts, as to what Congress accomplished by enacting 5 U.S.C. § 552(a)(1)(1976) should be cleared up.

Thus in *Gulf Oil Corp.* v. *Morton*, 493 F.2d 141 (9th Cir. 1974), involving the formal suspension (and corresponding lease-term extension) of many mid-Channel leases imposed by Secretary Morton after the trial of the present case, the Ninth Circuit affirmed the Secretary's right to do so, for a time, when he acted for a declared and disclosed purpose which was consistent with the interests entrusted to his supervision by the OCSL Act. But, as the court also then said, "the statutes involved do not give the Secretary carte blanche to continue suspending the leases until he finds a Congress that will accept his proposal." (493 F.2d at 149)

In the later case of *Union Oil Co.* v. *Morton*, 512 F.2d 743 (9th Cir. 1975), overruling the Department's formal revocation, on an administrative record, of an application by Union Oil to install a third platform on the "blow out" parcel at Santa Barbara, the court held that even his formal suspension of power is limited. "An open-ended suspension of the right granted to install a drilling platform would be a *pro tanto* cancellation of its lease." A valid suspension must be "conditioned by the occurrence of *certain* future events." (512 F.2d at 751)

The events apparent to petitioners and to the world in 1969, following the Union Oil spill, brought petitioners' case within the ambit of the latter ruling. The Secretary, in response to what the Trial Judge termed "mounting political pressure" (A-292), repeatedly referred, in public forums, to "shutdown orders" and "indefinite suspensions" of drilling. (A-292) Meanwhile the Department did not formally suspend petitioners' operations for a finite period for disclosed reasons which it deemed consistent with the OCSL Act while, at the same time, affording them a corresponding extension of their lease terms. Rather it ignored Pauley's telegraphed request for information (A-5)

and simply deposited its permit application in a file drawer to hold "in abeyance". (A-25; Px 537) Although the application was one for a "license" within the meaning of the APA, 5 U.S.C. § 551(8), (9), (12) (1976), it never was approved or rejected for a stated reason in a reasonable time or at any time. It simply was not acted upon.

This unexplained, and therefore arbitrary, refusal to permit petitioners to drill was a repudiation of the obligations the Government had incurred by contract, a year before, in return for advance payments of $73,854,594. Standing alone, this would be and, we submit, should have been found to be, a breach of petitioners' contracts. The Government has thus far been able to justify its course by saying that there was, after the spill, a new condition to consideration of a lessee's application at Santa Barbara, *viz.*, the lessee's successful negotiation of the "clearance procedure".* But, we submit, APA § 5 U.S.C. § 552(a)(1) (1976), and the cases construing it, make it plain that petitioners could "not in any manner be required to resort to,

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* The "procedure" described by the Government's witnesses and the Report (A-311-17) applied to the entire Channel and was one of general application within the teaching of the cases, *see Reynolds Metals Co.* v. *Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978); *St. Elizabeth Hospital* v. *United States*, 214 Ct.Cl. 322, 558 F.2d 8 (1977); *Anderson* v. *Butz*, 550 F.2d 459 (9th Cir. 1977); *Sannon* v. *United States*, 460 F.Supp. 458 (S.D.Fla. 1978); *Lewis* v. *Weinberger*, 415 F.Supp. 652 (D.N.M. 1976). The needed "clearance" was, as well, a "license" within the definitions of the APA. Petitioners although not aware of the existence of the "procedure", did make a written response, on April 3, 1969, to the Secretary's telegram of March 1, 1969 and related letters of the Regional Supervisor which the Government's witnesses characterized as the initiation of the "procedure". (A-326) This application, too, was not acted upon. It was neither granted nor denied and returned to petitioners for want of what the Government now says was sufficient information. The "clearance" application was simply allowed to sit—presumably because, in 1969 and 1970, the Department had no measurable standards for drilling *vel non* in mid-Channel.

or to be adversely affected by", such an unpublished "procedure".

The Court of Claims says petitioners "could have obtained the information if they had wished to press" (A-28, n.27). But the statute mandates that the Government publish, not that the citizen "press". And, in any case, this comment can refer, at most, to the procedural dimensions of the licensing mechanism. Those were described at trial, but there is nothing to indicate what substantive criteria, if any, were employed by the Department to distinguish a "clearable" from an "unclearable" lease. They are not described in the Report; they are not mentioned in the Opinion; they are not disclosed in the record despite the testimony of virtually everyone, from the Secretary of the Interior down, who had any significant role in the conduct of the "procedure." The criterion could have been, for all one knows, the editorial temperature of *The Los Angeles Times*. Thus, the process was, not only unpublished, but without standards when applied *in camera*.

The Court of Claims' endorsement of this performance is incompatible, we submit, with the holdings of other courts and with the implications of this Court's one prior address to 5 U.S.C. § 552(a)(1) (1976).

In *Morton* v. *Ruiz*, 415 U.S. 199 (1974), this Court invalidated, under 5 U.S.C. § 552(a)(1) (1976), a refusal by the Department of the Interior to award certain benefits to Indians on the basis of a policy which was within the Secretary's discretion to adopt, but which had been published only in the Department's *Indian Affairs Manual*, not in the *Federal Register*. It then said:

> "[T]he agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." (*Id.* at 231)

and went on to say:

> "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. *See generally* S. Rep. No. 752, 79th Cong., 1st Sess., 12-13 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess., 21-23 (1946)." (*Id.* at 232)

In *Appalachian Power Co.* v. *Train*, 566 F.2d 451 (4th Cir. 1977), the court denied enforcement to a published regulation of the Environmental Protection Agency which referred its standards, in part, to a "Development Document" which had not been published in, or incorporated into, the *Federal Register*, but which was available for inspection at EPA offices and had been distributed by the EPA in booklet form. Although the agency urged that such availability, which went far beyond anything on display in the present case, was enough, the court disagreed, saying:

> "The Administrative Procedure Act sharply distinguishes between the concepts of actual notice and reasonable availability. The former is in a sense a substitute for publication; one who has actual notice of an unpublished regulation is bound by it even though the regulation was required to be published. [citation omitted] But reasonable availability is not a substitute for publication. . . ." (*Id.* at 456)

Similarly, in *Northern California Power Agency* v. *Morton*, 396 F.Supp. 1187 (D.D.C. 1975), *aff'd w/o opinion*, 539 F.2d 243 (D.C. Cir. 1976), the court invalidated, under 5

U.S.C. § 552(a)(1) (1976), a rate-making for California's Central Valley Project which the Bureau of Reclamation had conducted in accordance with unpublished procedures in which the plaintiff had extensively participated. Responding to the Government's argument that plaintiff had adequate notice, the court said:

> "The Court rejects this position. . . . Where 'timely' notice of 'rules of procedure' is required, the statute cannot be satisfied by actual notice of the Department's improvised decisions as each new problem arises. *What is contemplated is a reasonably complete code of procedures set out in advance by which actions can be guided and strategies planned. This simply was not provided.*
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> • • •
>
> "The Department must be more precise, timely and informative before it can take refuge in the exemption. This is particularly apparent when one considers the present proceeding was the first of its kind in many years, and involved complicated technical facts, large sums of money, and multiple parties. *Congress wisely recognized after years of experience that such proceedings require the discipline which a published set of rules drawn up in advance can provide.* The Department's desire to avoid red tape cannot override the statute." (396 F.Supp. at 1191-92)

See, as well, *Anderson* v. *Butz*, 550 F.2d 459, 463 (9th Cir. 1977); *W.G. Cosby Transfer & Storage Corp.* v. *Froehlke*, 480 F.2d 498 (4th Cir. 1973); K. Davis, *Administrative Law of the Seventies* § 3A.7, at 75 (1976); *cf. Way of Life Television Network, Inc.* v. *FCC*, 593 F.2d 1356 (D.C. Cir. 1979).

The Court of Claims has, in this case, turned its back on these authorities, suggesting that an agency can free itself

from the publication requirements of 5 U.S.C. § 552(a)(1) (1976) if it can convince a court, long after the fact, that the citizen might have found out what the agency wanted, but preferred not to publicly disclose. The court, moreover, has done so not in a case such as *Appalachian Power Co.* v. *Train, supra*, where there may have been innocent uncertainty about just how much data had to be published in the *Federal Register*. Rather it has done so in a situation where secrecy was the necessary means by which the Department enforced a standardless, and altogether capricious, discretion over its lessees' right to drill—a discretion which, in this case, was exercised to destroy an investment of $74,000,000.

The willingness of the Court of Claims to sustain the Government's secret procedure, as a justification for its denial of petitioner's right to drill with the consequent loss of their leases, is especially disturbing when the result of the present case is contrasted with the result of the three other major litigations involving the Department's interdiction, over many years, of normal operations in the Santa Barbara Channel. In *Gulf Oil Corp.* v. *Morton*, 493 F.2d 141 (9th Cir. 1974); *Union Oil Co.* v. *Morton*, 512 F.2d 743 (9th Cir. 1975), and, indeed, *Sun Oil Corp.* v. *United States*, 215 Ct.Cl. 716, 572 F.2d 786 (1978), lessees which challenged overt bans by the Department won their cases, retained their leases, and achieved other appropriate remedies because the Department could not, on open records, justify its actions. Here, by way of contrast, the Court of Claims has found warrant for a directly opposite result in the Department's undisclosed and still-undocumented procedure.

What 5 U.S.C. § 552(a)(1) (1976) means is a matter of public importance which affects every citizen who deals with the government and every agency which deals with the

public. It goes to the heart of the people's confidence in the integrity of their Government. If so respected a tribunal as the Court of Claims can find in that section a continuing sanction for the clandestine governance displayed in this record, there is, we submit, a dangerous misapprehension abroad in the land—one which the Opinion below will serve to foster and spread. This Court should make this case its vehicle for eliminating that error.

II.

The Unresolved Question of the Effect of a Conflict Between Secretarial Regulations and "Adopted" State Law on the OCS Warrants This Court's Attention.

Plaintiffs' alternative claim of contractual "frustration" focused on the contention that Secretary Hickel's regulatory promulgation of February 17, 1979, which imposed on OCS oil and gas lessees the duty to make "reparation of any damage, to whomsoever occuring, proximately resulting" from "the waters of the high seas being polluted by the drilling or production operations of the lessee", 30 C.F.R. § 250.42(b) (Stat. App. 51), placed a heavy, unforeseeable and, in the context of the Channel, unconscionable burden on petitioners' drilling.

If petitioners' operations were to be struck in the future by an earthquake (A-58), a ship (A-59), an errant missile from the test range at the nearby Vandenberg AFB (A-68-69), or any eventuality beyond their reasonable control, they would be left defenseless, in the setting of the highly developed Channel (A-60), against claims which could easily range up to a billion dollars. (Px 680-95)

The Secretary's absolutist regulation represented, in our view, a sharp, and harshly adverse, departure from the standard of care existing with respect to such spill episodes

when the leases issued—whether that pre-existing standard came, as we urge, from the defendant's earlier operating regulations or, as the Government contended, from the tort law of California, as of August 7, 1953, which, it said, was adopted as federal law for the Channel OCS by OCSL Act §4(a)(2), 43 U.S.C. §1333(a)(2) (Stat. App. 21-22). The latter argued that the Secretary's regulations, neither those of 1954-1968 nor Mr. Hickel's enactment of February 17, 1969, displaced the "adopted" law of California so that no "frustrating" change of tort standards was imposed on petitioners on February 17, 1969 (A-14 n. 12).

Thus the present action poses a choice-of-law issue important to the administration of the on-going and expanding activities on the Outer Continental Shelf and the vast number of Americans likely to be affected by them*—whether a Secretarial regulation which seeks, explicitly, to regulate a lessee's responsibility to third parties for drilling misadventures on the OCS displaces the otherwise "adopted" laws of the upland states.

The Court of Claims refused to face that issue below. It noted only that the choice-of-law questions on the OCS are conceptually difficult (A-16-17) and that "both before and after the amendment of February 21, 1969 [its *Federal Register* publication date], the standard of liability was uncertain and ambiguous". (A-17) In pursuit of "uncertainty", the court even suggested (although never urged by

* As of December 31, 1977 there were 2,146 oil and gas leases in effect on the OCS, covering over 10,000,000 acres. *See* U.S. Dep't of the Interior, *Outer Continental Shelf Statistics* 26 (1978). These included parcels off the shores of Alabama, Alaska, California, Florida, Louisiana, Mississippi, and Texas and 93 parcels which the Department classified as "Mid-Atlantic". (*Ibid.*) Implementing President Carter's energy message of April 5, 1979, the Department announced on June 8, 1979 a schedule for future OCS leasing which calls for 30 sales, involving areas off the East, West, Gulf, and Alaskan coasts, from 1980 through 1985. U.S. Dep't of the Interior, *News Release*, June 8, 1979.

the Government to do so) that a departmental regulation of this character might have no effect upon leases in existence at the time of its promulgation. (A-28) The court, by such rulings, has added to the uncertainty of a difficult, but important, area of the law which this Court now should undertake to clarify.

The suggestion of the Court of Claims that a Secretary cannot make effective, as to existing OCS leases, significant amendments to his Department's operating regulations seems to us flatly inconsistent with the language of OCSL Act § 5(a)(1), 43 U.S.C. § 1334(a)(1) (1976)* (Stat. App. 25). It is in conflict, as well, with the decision of the Court of Appeals for the Ninth Circuit in *Union Oil Co.* v. *Morton*, 512 F.2d 793 (9th Cir. 1975), where the court upheld the Secretary's right to apply amended regulations (short of those which had the effect of a "taking") to pre-existing leases, saying:

> "The Secretary's authority to issue conservation regulations binding previously executed leases is clearly expressed in the [OCSL] Act, 43 U.S.C. § 1334(a)(1). . . ." (512 F.2d at 748)

Assuming the applicability of the Secretary's amendment of February 1969 to then-existing leases, including petitioners', there remains the question of the amendment's effect *vis-a-vis* the substantive tort law of California, which otherwise would be "adopted" as federal law by OCSL

* The section provides, *inter alia*, that

"such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. . . ."

The implementation of such amendments may, on occasion, give rise to a non-specific remedy on behalf of the lessee, but that is very different from the Court of Claims' suggestion that a lessee need not comply with them because the Secretary cannot make his regulatory will effective with respect to existing leases.

Act § 4(a)(2) and applied to damaging episodes comprehended by the regulation. The Court of Claims' finesse of this question has introduced, we submit, further uncertainty into an area of the law which now warrants clarification at the highest level. The need has become increasingly urgent by reason of the recent extension of OCS oil and gas activities to the offshore waters of many additional Atlantic coast states and of the wide gap which now exists between so many of the Secretary's absolutist regulations, adopted in February and August 1969, and "normal" tort law.

This Court has twice addressed the meaning of OCSL Act § 4(a)(2) in the context of cases involving injured workmen—but only to resolve conflicts between "adopted" State law and other federal standards said to have their roots in statutory, admiralty or common law sources outside the OCSL Act. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Rodrique* v. *Aetna Casualty Co.*, 395 U.S. 352 (1969). In both cases this Court recognized a wide role for "adopted" State law, but in neither instance did it face, or consider, an asserted conflict between regulations of the Secretary of the Interior promulgated under the OCSL Act itself and "adopted" State law.

More recently, the question of such conflict has become a lively and important issue. In *Armstrong* v. *Chambers & Kennedy*, 340 F.Supp. 1220 (S.D. Tex. 1972), *modified on other grounds*, 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, 423 U.S. 886 (1975), the court resorted to the Secretary's regulations, as amended in 1969, to impose upon an OCS lessee a tort liability in favor of an independent contractor's workman which the court held the otherwise "adopted" law of Texas would not have allowed. In *Bourg* v. *Texaco Oil Co., Inc.*, 578 F.2d 1117 (5th Cir. 1978), and *Olsen* v. *Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977), the court

rejected this view, holding that, since OCSL Act § 4(c), 43 U.S.C. § 1333(c) (1976) (Stat. App. 22-23), extends the Longshoremen's and Harbor Workers' Compensation Act to workmen on the OCS and "adopts" potential state remedies, private rights of action in favor of workmen should not be derived from the OCSL Act through general regulations issued thereunder by the Secretary.

Here, however, we deal with a "pollution" regulation which expressly purported to protect, and was repeatedly depicted by the Secretary as seeking to protect, in a specific and precisely defined way a broad range of third-party interests. These may be affected, and severely, by activities under the OCSL Act. And, unlike the interests of workmen, they can have, under the Act, the benefit of no federally designed standards for their protection unless such standards are supplied through regulations of the Secretary.* The question, much debated, of the extent and effect of the Secretary's undoubted power to regulate broadly with respect to activities on the OCS is clearly posed by the action, and it should, we submit, be addressed here.

* OCS activities are conducted off the shores of an increasing number of States, are activities which the United States affirmatively administers and in which it has a proprietary interest, and take place on Government lands in a marine environment where State law, as such, has never run. Such activities may warrant uniform and novel legal responses—Secretary Hickel certainly thought they did in 1969—and it would be anomalous if the Secretary did not have the competence to supply them.

CONCLUSION

Petitioners were victimized—the investment by their lessee group of $74,000,000 in lease bonus payments to the United States was destroyed—by the Department of the Interior's harsh and arbitrary response to the spill of January 28, 1968 at Santa Barbara.

The Court of Claims, when rejecting petitioners' claims, erred by its refusal to apply, in petitioners' behalf, the publication provisions of the Administrative Procedure Act and by its refusal to address important issues as to choice-of-law under the OCSL Act.

The petition prayed should issue.

Respectfully submitted,

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July 3, 1979

EXHIBIT A

Exhibit A

Text of Lease OCS-P-0218 for Tract 375

Form 3380—1 (February 1966) (formerly 4—1255) UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT OIL AND GAS LEASE OF SUBMERGED LANDS UNDER THE OUTER CONTINENTAL SHELF LANDS ACT	Office Los Angeles, Calif.	
	Serial Number OCS-P 0218	
	Cash Bonus $43,503,147.00	
	Rental Rate $3 per acre	
	Minimum Royalty Rate $3 per acre	Royalty Rate 1/6th

This indenture of lease entered into and effective as of MAR 1 1968, by and between the United States of America, hereinafter called the Lessor, by the Director, Bureau of Land Management, and

Pauley Petroleum Inc	25.341%
Ashland Oil & Refining Company	12.273%
Colorado Oil and Gas Corporation	15.340%
J. M. Huber Corporation	12.5%
Husky Oil Company	12.273%
Midwest Oil Corporation	12.273%
Kewanee Oil Company	10%

hereinafter called the Lessee, under, pursuant, and subject to the terms and provisions of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C., Sec. 1331, *et seq.*), hereinafter referred to as the Act, and to all lawful and reasonable regulations of the Secretary of the Interior (hereinafter referred to as the Secretary) when not inconsistent with any express and specific provisions herein, which are made a part hereof:

WITNESSETH:

Sec. 1. Rights of Lessee. That the Lessor, in consideration of a cash bonus and of the rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the Lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all oil and gas deposits except helium gas in or under the following-described area of the Outer Continental Shelf (as that term is defined in the Act):

All Block 48N 63W Official Leasing Map, Channel Islands Area Map No. 6B.
containing 5,760 acres, more or less (hereinafter referred to as the leased area), together with:

(a) the nonexclusive right to conduct within the leased area geological and geophysical explorations which are not unduly harmful to aquatic life;

(b) the right to drill water wells within the leased area and use free of cost, and to dispose of, water produced from such wells; and

(c) the right to construct or erect and to maintain within the leased area all artificial islands, platforms, fixed or floating structures, sea walls, docks, dredged channels and spaces, buildings, plants, telegraph or telephone lines and cables, pipelines, reservoirs, tanks, pumping stations, and other works and structures necessary or convenient to

the full enjoyment of the rights granted by this lease, for a period of 5 years and as long thereafter as oil or gas may be produced from the leased area in paying quantities, or drilling or well reworking operations, as approved by the Secretary, are conducted thereon; subject to any unitization or pooling agreement heretofore or hereafter approved by the Secretary which affects the leased area or any part thereof, the provisions of such agreements to govern the leased area or part thereof subject thereto where inconsistent with the terms of this lease.

Sec. 2. Obligations of Lessee. In consideration of the foregoing, the Lessee agrees:

(a) Rentals and royalties. (1) To pay rentals and royalties as follows:

Rentals. To pay the Lessor on or before the first day of each lease year commencing prior to a discovery of oil or gas on the leased area, a rental of $3.00 per acre or fraction thereof.

Minimum royalty. To pay the Lessor in lieu of rental at the expiration of each lease year commencing after discovery a minimum royalty of $3.00 per acre or fraction thereof or, if there is production, the difference between the actual royalty paid during the year and the prescribed minimum royalty, if the actual royalty paid is less than the minimum royalty.

Royalty on production. To pay the Lessor a royalty of 16⅔ percent in amount or value of production saved, removed, or sold from leased area. Gas of all kinds (except helium and gas used for purposes of production from and operations upon the leased area or unavoidably lost) is subject to royalty.

(2) It is expressly agreed that the Secretary may establish reasonable minimum values for purposes of computing royalty on products obtained from this lease, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, or area, to the price received by the Lessee, to posted prices, and to other relevant matters. Each such determination shall be made only after due notice to the Lessee and a reasonable opportunity has been afforded the Lessee to be heard.

(3) When paid in value, such royalties on production shall be due and payable monthly on the last day of the month next following the month in which the production is obtained. When paid in production, such royalties shall be delivered at pipeline connections or in tanks provided by the Lessee. Such deliveries shall be made at reasonable times and intervals and, at the Lessee's option, shall be effected either (i) on or immediately adjacent to the leased area, without cost to the Lessor, or (ii) at a more convenient point closer to shore or onshore, in which event the Lessee shall be entitled to reimbursement for the reasonable cost of transporting the royalty substance to such delivery point. The Lessee shall not be required to provide storage for royalty taken in kind in excess of tankage required when royalty is paid in value. When payments are made in production the Lessee shall not be held liable for the loss or destruction of royalty oil or other liquid products in storage from causes over which the Lessee has no control.

(4) Rentals or minimum royalties may be reduced and royalties on the entire leasehold or any deposit, tract, or portion thereof segregated for royalty purposes may be reduced if the Secretary finds that, for the purpose of increasing the ultimate recovery of oil or gas and in the interest of conservation of natural resources, it is necessary,

in his judgment, to do so in order to promote development, or because the lease cannot be successfully operated under the terms fixed herein.

(b) Bonds. To maintain at all times the bond required prior to the issuance of this lease and to furnish such additional security as may be required by the Lessor if, after operations or production have begun, the Lessor deems such additional security to be necessary.

(c) Cooperative or unit plan. Within 30 days after demand, to subscribe to and to operate under such reasonable cooperative or unit plan for the development and operation of the area, field, or pool, or part thereof, embracing lands included herein as the Secretary may determine to be practicable and necessary or advisable in the interest of conservation which plan shall adequately protect the rights of all parties in interest, including the United States.

(d) Wells. (1) To drill and produce such wells as are necessary to protect the Lessor from loss by reason of production on other properties or, in lieu thereof, with the consent of the oil and gas supervisor, to pay a sum determined by the supervisor as adequate to compensate the Lessor for failure to drill and produce any such well. In the event that this lease is not being maintained in force by other production of oil or gas in paying quantities or by other approved drilling or reworking operations, such payments shall be considered as the equivalent of production in paying quantities for all purposes of this lease.

(2) After due notice in writing, to drill and produce such other wells as the Secretary may reasonably require in order that the leased area or any part thereof may be properly and timely developed and produced in accordance with good operating practice.

(3) At the election of the Lessee, to drill and produce other wells in conformity with any system of well spacing or production allotments affecting the area, field, or pool in which the leased area or any part thereof is situated, which is authorized or sanctioned by applicable law or by the Secretary.

(e) Payments. To make all payments to the Lessor by check, bank draft or money order payable as indicated herein unless otherwise provided by regulations or by direction of the Secretary. Rental, royalties, and other payments shall be made payable to the United States Geological Survey and tendered to the Oil and Gas Supervisor, *except* that filing charges, bonuses, and first year's rental shall be made payable to the Bureau of Land Management and remitted to the Manager of the appropriate field office of that Bureau.

(f) Contracts for disposal of products. To file with the Oil and Gas Supervisor, Geological Survey, not later than 30 days after the effective date thereof, copies of all contracts for the disposal of lease products; provided that the Supervisor may relieve the Lessee of this requirement, in which event the contracts shall be made available for inspection by the Supervisor upon his request. Nothing in any such contract or in any approval thereof by the Supervisor shall be construed or accepted as modifying any of the provisions of this lease, including, but not limited to, provisions relating to gas waste, taking royalty in kind, and the method of computing royalties due as based on a minimum valuation and in accordance with the regulations applicable to this lease.

(g) Statements, plats, and reports. At such times and in such form as the Lessor may prescribe, to furnish detailed statements and reports showing the amounts and quality of all products saved, removed, and sold from the

leased area, the proceeds therefrom, and the amount used for production purposes or unavoidably lost; also a plat showing development work and improvements on or with regard to the leased area.

(h) Inspection. To keep open at all reasonable times for the inspection of any duly authorized representative of the Lessor, the leased area and all wells, improvements, machinery and fixtures thereon and all books, accounts, and records relative to operations and surveys or investigations on or with regard to the leased area or under the lease.

(i) Diligence. To exercise reasonable diligence in drilling and producing the wells herein provided for; to carry on all operations in accordance with approved methods and practices including those provided in the operating and conservation regulations for the Outer Continental Shelf; to remove all structures when no longer required for operations under the lease to sufficient depth beneath the surface of the waters to prevent them from being a hazard to navigation; to carry out at expense of the Lessee all lawful and reasonable orders of the Lessor relative to the matters in this paragraph, and that on failure of the Lessee so to do the Lessor shall have the right to enter on the property and to accomplish the purpose of such orders at the Lessee's cost: *Provided,* That the Lessee shall not be held responsible for delays or casualties occasioned by causes beyond the Lessee's control.

(j) Freedom of purchase. To accord all workmen and employees directly engaged in any of the operations under this lease complete freedom of purchase.

(k) Equal Opportunity clause. During the performance of this contract the lessee agrees as follows:

(1) The lessee will not discriminate against any employee or applicant for employment because of race, creed,

color, or national origin. The lessee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The lessee will, in all solicitations or advertisements for employees placed by or on behalf of the lessee, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The lessee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the lessee's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The lessee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The lessee will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the lessee's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the lessee may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The lessee will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The lessee will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the lessee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the lessee may request the United States to enter into such litigation to protect the interests of the United States.

(l) Assignment of lease. To file for approval with the Bureau of Land Management, within 90 days from the date

of final execution, any instrument of transfer of this lease, or any interest therein, including assignments of record title, operating agreements, and subleases. Carried working interests, overriding royalty interests, or payments out of production, may be created or transferred without requirement for filing or approval. Instruments required to be filed shall take effect upon approval as of the first day of the lease month following the date of filing unless at the request of the parties an earlier date is specified in such approval.

Sec. 3. Reservations to Lessor. The Lessor reserves:

(a) Geological and geophysical exploration; rights-of-way. The right to authorize the conduct of geological and geophysical exploration in the leased area which does not interfere with or endanger actual operations under this lease, and the right to grant such easements or rights-of-way upon, through, or in the leased area as may be necessary or appropriate to the working of other lands containing the deposits described in the Act, and to the treatment and shipment of products thereof by or under authority of the United States, its Lessees or Permittees, and for other public purposes, subject to the provisions of Section 5*(c)* of the Act where they are applicable and to all lawful and reasonable regulations and conditions prescribed by the Secretary thereunder.

(b) Leases of sulfur and other mineral. The right to grant sulfur leases and leases of any mineral other than oil, gas, and sulfur within the leased area or any part thereof, subject to the provisions of Section 8*(c)*, 8*(d)*, and 8*(e)* of the Act and all lawful and reasonable regulations prescribed by the Secretary thereunder; *Provided,* That no such sulfur lease or lease of other mineral shall authorize or permit the Lessee thereunder unreasonably to interfere with or endanger operations under this lease.

(c) Purchase of production. In time of war, or when the President of the United States shall so prescribe, the right of first refusal to purchase at the market price all or any portion of the oil or gas produced from the leased area, as provided in Section 12*(b)* of the Act.

(d) Taking of royalties. All rights, pursuant to clause (3) of Section 8*(b)* of the Act, to take royalties in the amount or value of production.

(e) Fissionable materials. All uranium, thorium, and all other materials determined pursuant to paragraph (1) of subsection *(b)* of Section 5 of the Atomic Energy Act of 1946, as amended, to be peculiarly essential to the production of fissionable materials, contained, in whatever concentration, in deposits in the subsoil or seabed of the leased area or any part thereof, as provided in Section 12*(e)* of the Act.

(f) Helium. Pursuant to Section 12*(f)* of the Act, the ownership and the right to extract helium from all gas produced under this lease, subject to such rules and regulations as shall be prescribed by the Secretary.

(g) Suspension of operations during war or national emergency. Upon recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or President of the United States after August 7, 1953, the authority of the Secretary to suspend any or all operations under this lease, as provided in Section 12*(c)* of the Act: *Provided,* That just compensation shall be paid by the Lessor to the Lessee.

(h) Restriction of exploration and operations. The right, as provided in Section 12*(d)* of the Act, to restrict from exploration and operations the leased area or any part thereof which may be designated by and through the Secretary of Defense, with the approval of the President,

as, or as part of, an area of the Outer Continental Shelf needed for national defense; and so long as such designation remains in effect no exploration or operations may be conducted on the surface of the leased area or the part thereof included within the designation except with the concurrence of the Secretary of Defense; and if operations or production under this lease within any such restricted area shall be suspended, any payments of rentals, minimum royalty, and royalty prescribed by this lease likewise shall be suspended during such period of suspension of operations and production, and the term of this lease shall be extended by adding thereto any such suspension period, and the Lessor shall be liable to the Lessee for such compensation as is required to be paid under the Constitution of the United States.

Sec. 4. Directional drilling. This lease may be maintained in force by directional wells drilled under the leased area from surface locations on adjacent or adjoining lands not covered by this lease. In such circumstances, drilling shall be considered to have been commenced on the leased area when drilling is commenced on the adjacent or adjoining land for the purpose of directionally drilling under the leased area, and production of oil or gas from the leased area through any directional well surfaced on adjacent or adjoining land or drilling or reworking of any such directional well shall be considered production or drilling or reworking operations (as the case may be) on the leased area for all purposes of this lease. Nothing contained in this paragraph is intended or shall be construed as granting to the Lessee any leasehold interests, licenses, easements, or other rights in or with respect to any such adjacent or adjoining land in addition to any such leasehold interests, licenses, easements, or other rights which the Lessee may have lawfully acquired under the Act or from the Lessor or others.

Sec. 5. Surrender and termination of lease. The Lessee may surrender this entire lease or any officially designated subdivision of the leased area by filing with the Bureau of Land Management, a written relinquishment, in *triplicate,* which shall be effective as of the date of filing, subject to the continued obligation of the Lessee and his surety to make payment of all accrued rentals and royalties and to abandon all wells on the area to be relinquished to the satisfaction of the Oil and Gas Supervisor.

Sec. 6. Removal of property on termination of lease. Upon the expiration of this lease, or the earlier termination thereof as herein provided, the Lessee shall within a period of 1 year thereafter remove from the premises all structures, machinery, equipment, tools, and materials other than improvements needed for producing wells or for drilling or producing on other leases and other property permitted by the Lessor to be maintained on the area.

Sec. 7. Remedies in case of default. (*a*) Whenever the Lessee fails to comply with any of the provisions of the Act or this lease or the applicable regulations in force and effect on the date of issuance of this lease, the lease shall be subject to cancellation as follows:

(1) *Cancellation of nonproducing lease.* If, at the time of such default, no well is producing, or is capable of producing, oil or gas in paying quantities from the leased area, whether such well be drilled from a surface location within the leased area or be directionally drilled from a surface location on adjacent or adjoining lands, this lease may be cancelled by the Secretary (subject to the right of judicial review as provided in Section 8*(j)* of the Act) if such default continues for the period of 30 days after mailing of notice by registered letter to the Lessee at the Lessee's record post office address.

(2) *Cancellation of producing lease.* If, at the time of such default, any well is producing, or is capable of producing, oil or gas in paying quantities from the leased area, whether such well be drilled from a surface location within the leased area or be directionally drilled from a surface location on adjacent or adjoining lands, this lease may be cancelled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of Section 4*(b)* of the Act if such default continues for the period of 30 days after mailing of notice by registered letter to the Lessee at the Lessee's record post office address.

(b) Other remedies. If any such default continues for the period of 30 days after mailing of notice by registered letter to the Lessee at the Lessee's record post office address, the Lessor may then exercise any legal or equitable remedy which the Lessor may have; however, the remedy of cancellation of this lease may be exercised only under the conditions and subject to the limitations set out above in paragraph *(a)* of this Section, or pursuant to Section 8*(i)* of the Act.

(c) Effect of waiver of default. A waiver of any particular default shall not prevent the cancellation of this lease or the exercise of any other remedy the Lessor may have by reason of any other cause or for the same cause occurring at any other time.

Sec. 8. Heirs and successors in interest. Each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Sec. 9. Unlawful interest. No Member of, or Delegate to, Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified,

and during his continuance in office, and no officer, agent, or employee of the Department of the Interior, except as provided in 43 CFR 7.4(a)(1), shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of Section 3741 of the Revised Statutes (41 U.S.C. Sec. 22), as amended, and Sections 431, 432 and 433 of Title 18 of the United States Code, relating to contracts made or entered into, or accepted by or on behalf of the United States, form a part of this lease so far as the same may be applicable.

THE UNITED STATES OF AMERICA
By WILLIAM E. GRANT /s/
(Authorized Officer)
Manager,
Bureau of Land Management
Los Angeles Office
(Title)
MAR 8, 1968
(Date)

LESSEES:

PAULEY PETROLEUM INC.
By WILLIAM R. PAGEN /s/
William R. Pagen,
President

ATTEST:

CLAUDE L. CAMERON /s/
Claude L. Cameron, Secretary

ASHLAND OIL & REFINING COMPANY
By ROBERT D. GORDON, JR. /s/
Robert D. Gordon, Jr.,
Vice-President

ATTEST:

illegible /s/
Asst. Secy.

COLORADO OIL AND GAS CORPORATION
By J. R. COLEMAN /s/
J. R. Coleman,
Vice-President

ATTEST:

C. E. TITUS /s/
C. E. Titus Assistant Secretary

J. M. HUBER CORPORATION
By LEE I. MEADOR /s/
Lee I. Meador,
Vice-President

ATTEST:

THOMAS O. MOXCEY /s/
Thomas O. Moxcey
Assistant Secretary

HUSKY OIL COMPANY
By GENE E. ROARK /s/
Gene E. Roark, President

ATTEST:

DONALD H. FLORA /s/
Donald H. Flora Secretary

MIDWEST OIL CORPORATION
By D. R. MURPHY /s/
D. R. Murphy, President

ATTEST:

M. I. NORDSTROM /s/
M. I. Nordstrom, Secretary

KEWANEE OIL COMPANY
By J. M. HARBISON /s/
J. M. Harbison, President

ATTEST:

CHARLES R. FELLOWS /s/
Charles R. Fellows

EXHIBIT B

Explanation of Map Depicting "Clearance" Status of Leases in Mid-Channel Area Seaward of the City of Santa Barbara.

Px 546 is a "Map Showing Oil and Gas Fields, Leased Areas, and Seeps in the Santa Barbara Channel Region" published by the Department of the Interior in the fall of 1969.* It shows, *inter alia*, the locations, by lease number, of all oil and gas leases issued by the Department in the Channel.

The map following the text of this Appendix was prepared by tracing (without change in scale) the principal geographical features in the mid-Channel portion of Px 546 and by annotating the tracing in the manner hereafter described.

The sea areas identified by the words "three-mile limit" and adjacent to land areas which are bounded by yellow highlighting are the areas released to the State of California by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* (1976). The areas bounded by blue highlighting represent the Federal Outer Continental Shelf.

The OCS areas are coded in one of three ways. Areas shown on Px 546 as unleased are indicated in white. Areas shown on Px 546 as leased are coded either as "uncleared" (by hatching) or as "cleared" (by cross-hatching). The status of a lease as "cleared" or "uncleared" was determined by reference to Px 999, a list of lease clearance dates produced by the Government on or about January 26,

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* Px 546 is Plate 2 of Geological Survey Professional Paper 679, "Geology, Petroleum Development, and Seismicity of the Santa Barbara Channel Region, California", published in October 1969. Pursuant to motion made at or about the time plaintiffs filed their principal brief on the Report of the Trial Judge in December 1976, plaintiffs were granted leave to file below (and have filed with the Clerk) additional copies of Px 546 for distribution to members of the panel.

1971 (Tr. 6355), and read into the record (Tr. 6356-59), in response to a trial subpoena on or about January 11, 1971 (Tr. 5517).* The map thus depicts the "clearance" status of leases at a date late in the trial of this case and two years after the Union Oil spill of January 28, 1969.

Certain leased parcels are identified on the map by number as follows:

(1)—OCS-P-0218 (Tract 375), one of the two tracts leased to plaintiffs.

(2)—OCS-P-0226 (Tract 384), the other tract leased to plaintiffs.

(3)—OCS-P-0227 (Track 385), a tract leased to Mobil Oil Corporation and others. Defendant's refusal to act on a drilling permit request filed with respect to this parcel in the fall of 1970 is described at A-150-51. This tract also is one of the 35 parcels formally suspended by the administrative orders of April 21, 1971 challenged in *Gulf Oil Corp.* v. *Morton,* 345 F.Supp. 685 (C.D. Calif. 1972), *remanded for entry of judgment for plaintiffs,* 493 F.2d 141 (9th Cir. 1974).

(4)—OCS-P-0234 (Tract 394), a tract leased to Texaco, Inc. and others. According to Px 999 it was cleared on August 1, 1969. Regional officials were directed, however, not to act on an application to drill a third well which Texaco filed with respect to this parcel in early September 1970. (*See* A-156.) This lease also was one of those involved in *Gulf* v. *Morton, supra.*

(5)—OCS-P-0241 (Tract 402), the "blowout" parcel leased to Union Oil Company and others. Defendant's efforts to block the installation of Platform C on this tract were the subject of *Union Oil Co.* v. *Morton,* 512 F.2d 743 (9th Cir. 1975).

(6)—OCS-P-0240 (Tract 401), a tract leased to Sun Oil Company and others. Defendant's efforts to block the installation of Platform Henry on this tract were the subject of *Sun Oil Co.* v. *United States,* 215 Ct. Cl. 716, 572 F.2d 786 (1978).

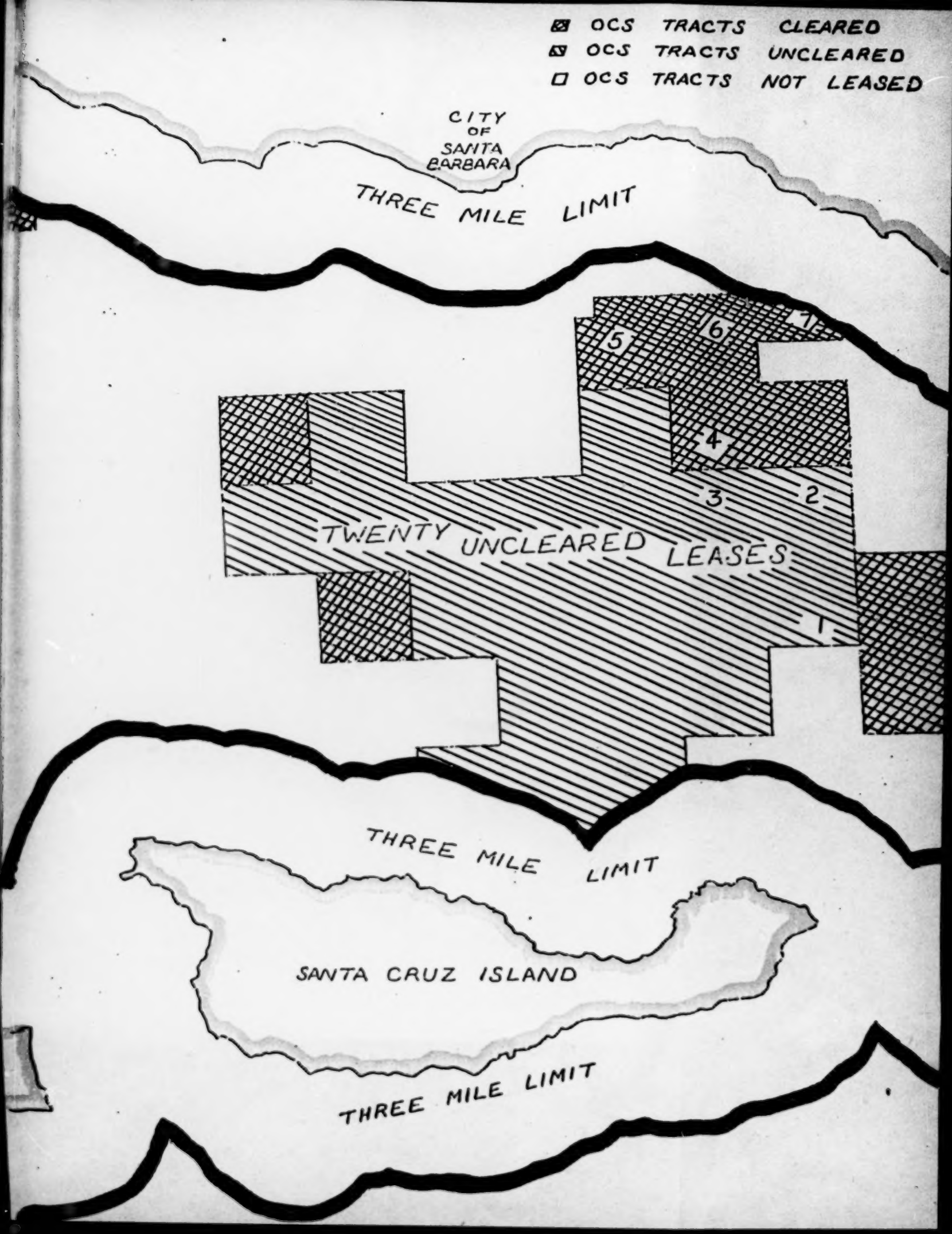
(7)—OCS-P-0166, a tract leased to Phillips Petroleum Company and others at the so-called "drainage" sale of December 1966 (A-55-56). Platforms were installed and production begun on this lease prior to Union Oil's mishap on January 28, 1969.

The leases identified as (5), (6) and (7) are shown on our map as "cleared" because they are so described in Px 999 and Px 1023. The testimony in this case of the Director of the Geological Survey indicates, however, that they were not studied pursuant to the Task Force II "procedure" described in this record and in the Report, but by other groups identified by Dr. Pecora as Tasks Force I and III. (Pecora Tr. 4119-21)

* * *

An examination of Px 546 will show that other parcels were leased in the eastern and western sections of the Channel not depicted on our map. According to Px 999 and 1023, most, but not all, of these other leases were "cleared." Actual drilling in these areas, post-blowout, was, however, limited. (Px 927)

* An identical list, stating whether particular leases were "cleared" or not, but not giving dates, appears in Dx 1023 at pp. 28-29. Dx 1023 is a draft environmental statement issued by the Geological Survey on February 23, 1971. The statement also contains (at p. 10) what appears to be the first published reference to the task forces and other elements of the "procedure" described by the Government's witnesses in the trial of this case some weeks before.


OCS TRACTS CLEARED
OCS TRACTS UNCLEARED
OCS TRACTS NOT LEASED
CITY OF SANTA BARBARA
THREE MILE LIMIT
7
6
5
4
3
2
1
TWENTY UNCLEARED LEASES
THREE MILE LIMIT
SANTA CRUZ ISLAND
THREE MILE LIMIT